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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 253

HERMAN FREDERICK MARKS, PETITIONER

v.

P. A. ESPERDY, DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

OPINION BELOW

The opinion of the court of appeals is reported at 315 F. 2d 673. The opinion of the district court is reported at 203 F. Supp. 389.

JURISDICTION

The judgment of the court of appeals was entered on April 9, 1963. The petition for a writ of certiorari was filed on July 5, 1963 and granted on October 14, 1963, 375 U.S. 810. The jurisdiction of this court rests upon 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner's service in the Rebel Army of Cuba for seventeen months following Castro's accession to power was voluntary service in the armed forces of a foreign state.

2. Whether Section 349(a)(3), providing for the expatriation of a native-born American citizen for voluntary service in the armed forces of a foreign state, is constitutional.

3. Whether it was proper for the administrative tribunal, in conducting a deportation proceeding, to determine whether petitioner previously had lost his American citizenship through foreign military service, and whether, in any event, he is prejudiced by the administrative determination, having now obtained a *de novo* judicial review of that issue.

4. Whether the deportation order was validly entered on the basis of petitioner's admitted entry into the United States without an immigrant visa.

STATUTE INVOLVED

The following pertinent sections of the Immigration and Nationality Act, 66 Stat. 163, were in effect at the times relevant to this case.

1. *Section 349, 8 U.S.C. 1481:*

> (a) From and after the effective date of this Act a person who is a national of the United States whether by birth or naturalization, shall lose his nationality by—
>
> * * * * *
>
> (3) entering, or serving in, the armed forces of a foreign state unless, prior to such entry or service, such entry or service is specifically

> authorized in writing by the Secretary of State and the Secretary of Defcase: Provided, That the entry into such service by a person prior to the attainment of his eighteenth birthday shall serve to expatriate such person only if there exists an option to secure a release from such service and such person fails to exercise such option at the attainment of his eighteenth birthday.

2. *Section 101(a)(15), 8 U.S.C. 1101(a)(15):*

> The term "immigrant" means every alien except an alien who is within one of the following classes of nonimmigrant aliens. * * *[1]

3. *Section 211(a), 8 U.S.C. 1181(a):*

> No immigrant shall be admitted into the United States unless at the time of application for admission he (1) has a valid unexpired immigrant visa * * *.

4. *Section 212(a)(20), 8 U.S.C. 1182(a)(20)* also commands the exclusion of—

> any immigrant who at the time of application for admission is not in possession of a valid, unexpired immigrant visa * * *.

5. *Section 241(a)(1), 8 U.S.C. 1251(a)(1)* requires the expulsion, upon order of the Attorney General, of any alien who—

> at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of such entry.

---

[1] The excepted nonimmigrant classes of aliens are not relevant here.

STATEMENT

Petitioner was born in Milwaukee, Wisconsin, in 1921. Early in 1958 he went to Cuba and joined Fidel Castro's revolutionary forces, which were then seeking to overthrow the Batista regime (R. 141a, 145a).[2] He fought in those forces throughout most of 1958, chiefly under the command of Che Guevara, one of Castro's principal commanders (R. 81b). He entered as a private but soon was promoted to the rank of lieutenant and then to captain (R. 80b–83b).

In November, 1958, petitioner returned to the United States for medical treatment of battle wounds, his expenses being paid by the revolutionary forces (R. 148a, 149a, 86b). He remained in this country, in the Miami area, during November and December. On January 1, 1959, Batista was overthrown and the Castro forces took control of Cuba. Within a few days, petitioner returned to Cuba and sought out the unit of the Rebel Army in which he had served, finding them stationed at La Cabana military fortress (R. 150a–151a, 87b). According to his account he went back to Cuba only for a "reunion" with his military comrades (R. 151a, 88b). However, it appears that he immediately began to serve again in the Rebel Army, in his rank as a captain, and continued to serve in that Army from January 1959 till May,

[2] Volume 1 of the record reproduces petitioner's Appendix in the court below, and the identifying letter "a" appears after each page reference. Volume 2, which includes some of the material in Volume 1, reproduces respondent's Appendix in the court below, and the identifying letter "b" appears after the page references. In addition, the entire record before the district court has been lodged with the Clerk of this Court.

1960, when he deserted and left Cuba (R. 121a, 152a, 89b–90b).

There are some inconsistencies in petitioner's account of his military service in Cuba in 1959 and 1960. The following facts, however are undisputed:

The day of his return to Cuba, petitioner ascertained the whereabouts of Che Guevara, his former commander, who had (and still has) one of the highest posts in the Castro government. He immediately went to the Presidential Palace or Capital building to see Che, who welcomed him cordially, put him up for the night in his own quarters, ate breakfast with him, and installed him on the following day as the officer in charge of security at La Cabana fortress, with the rank of Captain (R. 152a–154a, 171a, 89b–92b). Petitioner's principal function was to accomplish the execution of the "war criminals" condemned to death by the military tribunals set up by Castro in La Cabana (R. 158a, 99b).

Petitioner remained at La Cabana until June 1959, supervising the execution of numerous condemned "war criminals" (R. 282a, 309b). From La Cabana he was transferred under military orders to various military posts in the interior of Cuba, charged primarily with security functions (R. 162a, 123a–125a, 57b–61b). He claims that such transfers resulted from his anti-Communist activities (R. 162a, 124a–125a, 58b–59b). However, there is no evidence or indication that he was ever molested for such alleged activities. In January 1960 he was transferred to Principe Prison in Havana. Under military orders and still in his rank as Captain, he was again assigned

to security duties (R. 125a–126a, 61b). In March 1960 he was assigned to a military school to supervise the training of military police; he remained there until he left Cuba (R. 193a, 141b).

It appears that throughout his stay in Cuba in 1959 and 1960 petitioner served in the Rebel Army (sometimes described also as the Revolutionary Forces) (R. 155a, 160a, 101b); that, after January 1, 1959, this was the dominant military force of Cuba, in complete control of that country (R. 163a, 200a, 223a, 225a, 214b, 234b); that petitioner wore the olive-green uniform of the Rebel Army, with the captain's insignia of three bars or chevrons on his cap and shoulders (R. 155a, 194a, 215a, 95b, 177b); that the men under his command likewise were members of the Rebel Army and wore its uniform (R. 155a, 159a, 207a, 97b, 99b, 101b, 102b, 189b–192b); that he exercised command authority over sizable military forces, in turn was subject to command authority and received military pay emanating from the Chief of Staff of the Rebel Army (R. 154a, 157a, 162a, 173a, 192a, 193a, 56b, 97b, 124b–131b, 308b); that he was issued an identification card as a Captain in the Rebel Army by the Chief of Staff of that Army (R. 109b–111b, 280a, 328b); and that during this period he faithfully discharged the duties assigned to him as a member of the Rebel Army, including the execution of prisoners sentenced by military courts (R. 99b, 309b). Petitioner admits that he performed such service (R. 153a–158a).

In February, 1960, while he was stationed at El Principe in Havana, petitioner received a notice,

served by a representative of the United States Department of State, that he had lost his United States citizenship because of his service in the Cuban Revolutionary Army under the Cuban Revolutionary Government (R. 52a, 127a, 166a, 254a, 63b, 296b). Petitioner took no formal action challenging this certificate or seeking to have it withdrawn (R. 168a, 120b). He did state, at a press interview, that he would not give up his United States citizenship without a good fight (R. 127a, 282a). He continued to serve in the Rebel Army until he deserted in May, 1960, assertedly because he had fallen into disfavor and feared arrest (R. 132a, 186a, 70b).

After fleeing from Cuba petitioner returned to the United States. His account is that he first went to Mexico and then reentered the United States at El Paso, Texas in July, 1960, being permitted to enter on his representation that he was an American citizen (R. 133a, 71b–72b). However, two witnesses testified that in May 1960 they were members of the crew of a fishing boat which picked up petitioner and a companion from a disabled boat in the Gulf of Mexico and brought them to Tampa, Florida, where they entered without reporting to immigration officers (R. 150b–172b). In any event, it is clear that at the time of his reentry in 1960 petitioner did not have or present an immigration visa as an alien (R. 1b; see R. 18a).

After his return to the United States, petitioner's presence here and his role in Cuba became known. Petitioner contributed to this knowledge by publishing a magazine article entitled "I was Castro's Killer"

(R. 179a–186a, 308b). On January 25, 1961, immigration officers called at his home to question him. He voluntarily accompanied them to the immigration office and gave them a statement describing his activities in Cuba (R. 59a–78a, 273b–274b). He thereupon was placed under arrest by the immigration officers and deportation proceedings were commenced (R. 78a, 17a). Release on administrative bond was denied on the ground that his record of numerous arrests in widely scattered cities in the United States, including two arrests as a fugitive from justice, made him a poor bail risk (R. 24a).

Thereafter, an extended hearing was held before a special inquiry officer. Petitioner was represented by his present counsel (R. 41a *et seq.*, 1b *et seq.*). The special inquiry officer, in an opinion dated May 31, 1961, found that Marks had lost his American citizenship through his service in the armed forces of Cuba in 1959 and 1960, and that he was deportable because, at the time of his entry into the United States in 1960, he was excludable on two grounds—(1) that he was not then in possession of an immigrant visa, and (2) that he previously had been convicted of a crime involving moral turpitude, to wit, carnal knowledge and abuse (R. 330b). Petitioner appealed to the Board of Immigration Appeals, which on August 2, 1961, upheld the deportation order and dismissed the appeal (R. 366b).

After the administrative proceedings had commenced, petitioner brought habeas corpus proceedings disputing his deportability and the refusal to release him on bail. This application was denied by District

Judge Levet on the ground that the challenge to the merits was premature and that the denial of bail rested on adequate grounds. *Application of Marks*, 198 F. Supp. 40. Upon conclusion of the administrative process, petitioner instituted new habeas corpus proceedings, contending that he was an American citizen and that his detention under the expulsion order was illegal (R. 1a *et seq.*). At the hearing before District Judge Cashin both parties stipulated that, in lieu of further hearings, the transcript of the proceedings before the special inquiry officer was to be received in evidence and considered *de novo* by the court (R. 30a).

The district court, after considering this evidence, ruled that the expatriation statute was constitutional and that petitioner had lost his United States citizenship through service in the armed forces of a foreign state. However, the court found the deportation order invalid on the ground that, because no court had decreed his citizenship lost at that point, petitioner was still a citizen at the time of his 1960 reentry and thus not subject to the documentary requirements prescribed for aliens. The court of appeals reversed. It agreed with the district court that petitioner had lost his United States citizenship and that the statute was constitutional. However, it found that expatriation had occurred upon performance by petitioner of the military service designated by the statute. It accordingly concluded that he was an alien at the time of his 1960 reentry and was deportable for failure to comply with the documentary requirements prescribed for immigrants.

During the judicial proceedings petitioner was admitted to bail and he is now at large on $1,000 bond (R. 2a, Pet. Br. 11).

SUMMARY OF ARGUMENT

I

A. It is undisputed that petitioner served in the Rebel Army of Cuba from January, 1959 to May, 1960. During that time he was a Captain in that army, and was charged with important responsibilities. He wore the uniform and insignia of rank, received an identity card and pay as a Captain of the Rebel Army, commanded a substantial number of troops, was subject to command orders and exercised command responsibilities.

B. During this same period, the Rebel Army unquestionably was the armed force, or a segment of the armed forces, of Cuba. Castro assumed power January 1, 1959, and was officially named Commander in Chief of Cuba's armed forces. His Rebel Army had triumphed and it became the dominant military force supporting the new government.

Petitioner's effort to compare the Rebel Army to various nonmilitary groups ignores the actualities—that it was a military agency of a foreign state, charged with its national security, and equipped with weapons. The claim that the Rebel Army was not engaged in combat or in preparing for combat is irrelevant. All armies, including the armed forces of the United States, perform functions which, in a sense, can be said to be "nonmilitary". Those participating in such activities do not lose their status as members

of the armed forces. And petitioner himself primarily performed military duties.

C. The record unequivocally demonstrates that petitioner's military service was voluntary. He was not under any compulsion when he voluntarily returned to Cuba after Castro had taken over its government. He was not conscripted and, as an American, would not have been subject to conscription, even if there had been a conscription law in Cuba. The claim of duress was advanced for the first time at the deportation hearing, is uncorroborated by anything in the record and indeed is contradicted by the evidence (including statements made by petitioner or directly attributable to him).

The circumstances of petitioner's voluntary return to Cuba in January, 1959 also negate any suggestion of coercion. Petitioner sought out his old army unit and his former commander, Che Guevara, who welcomed him cordially and immediately assigned him to a high security position, which included the responsibility of executing condemned "war criminals". He never complained to the American diplomatic and consular officers and never sought their help, although he had frequent contact with them in the course of his duties.

II

Petitioner's service in the armed forces of Cuba expatriated him under the terms of Section 349(a)(3). The statute cannot be construed to require an affirmative intention to cast off United States citizenship. Such a construction is precluded by the language and structure of the statute, as well as its legislative his-

tory. Moreover, it is directly opposed to this Court's holdings in *Mackenzie* v. *Hare*, 239 U.S. 299; *Savorgnan* v. *United States*, 338 U.S. 491; and *Perez* v. *Brownell*, 356 U.S. 44, all of which declared that expatriation resulted from voluntary overt action, irrespective of subjective intention.

III

A. Petitioner's attempt to characterize Section 349 (a)(3) as punitive, and thus subject to constitutional mandates dealing with punishment, cannot prevail. There is nothing in the statute itself, in its legislative antecedents, or in any other material to suggest a punitive aim. A statute not penal on its face can be deemed punitive only upon an overwhelming showing that punishment was intended. *Flemming* v. *Nestor*, 363 U.S. 603, 613. There is no indication whatever of such a purpose.

The reliance on *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, and the plurality opinion in *Trop* v. *Dulles*, 356 U.S. 86, is misplaced. Both cases found, on the basis of other and different statutes and their legislative histories, that the laws there in question were designed to impose punishment.

The supposition that the statute is punitive because it may result in statelessness is unwarranted. The plurality opinion in *Trop* deemed statelessness a cruel and unusual punishment, but only in relation to a statute it found to have a punitive aim. Statelessness unquestionably is a severe and undesirable consequence and one which invites consideration under the municipal laws of the various nations. But this alone

does not make it punishment, in the constitutional sense, in the absence of an explicit penal design.

B. Section 349(a)(3) is a reasonable exercise of legislative power to deal with the twin problems of potential embroilments and impaired allegiance. Military service by American nationals in foreign armies has been of concern to our nation since the founding of the Republic. It may violate national policies of neutrality or of commitment and may lead our nation into embarrassments and perils. Moreover, military service entails even greater impairment of allegiance to this country than voting (involved in *Perez* v. *Brownell*, 356 U.S. at 50) since military service is deemed one of the highest obligations of citizenship. As shown in *Perez*, the sponsors of the 1907 expatriation statute emphasized the desire to deal with "increasing embarrassment" in our foreign relations. In the 1940 codification, which introduced the provisions for loss of citizenship through foreign military service, Congress emphasized its conviction that such service was also inconsistent with continued allegiance to the United States. In the current statute, the relationship between foreign military service and the conduct of foreign affairs is indicated in the provision for authorization of such service by the joint action of Secretary of State and the Secretary of Defense.

In providing for expatriation, Congress has adopted a reasonable method of implementing its power over foreign affairs. It reasonably concluded that in such situations "there is no acceptable alternative to expatriation as a means of avoiding possible embarrassments to our relations with foreign nations". *Trop*

v. *Dulles*, 356 U.S. at 106 (concurring opinion). "The termination of citizenship terminates the problem". *Perez* v. *Brownell*, 356 U.S. at 60.

The contention that in some instances the foreign military service may be "nonembarrassing" to this country misses the point. Congress is not limited to dealing with a problem of this dimension on an *ad hoc* basis; it may legislate through reasonable and generalized classifications. *Perez* v. *Brownell*, 356 U.S. at 59–60. The classification here cannot be said to be inappropriate. Moreover, Congress has taken into account possible variances by authorizing advance approval by the Secretary of State and the Secretary of Defense. This formula properly places the assessment of the interests of the United States where it belongs, in the foreign affairs agencies of our government.

IV

A. There is no substance to the contention that expatriation can be established only by a judicial determination of alienage. The statute provides for expatriation upon the performance of the expatriating act, and this unmistakable design is confirmed in the legislative history.

It cannot be said that Congress lacks power to prescribe such a consequence. Every decision of this Court, from the earliest cases, has found or assumed that expatriation would result automatically from the performance of overt acts. Indeed, *Perez* v. *Brownell*, 356 U.S. 44, 60–61, regarded the automatic nature of expatriation as the major reason for its value in aiding the foreign affairs function. See, also,

Trop v. *Dulles*, 356 U.S. 86; *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144.

Acceptance of the view that expatriation must await a judicial ruling would strip the expatriation statutes of much of their value in implementing the foreign affairs function. On the other hand, rejection of that view still leaves the citizen with fully adequate remedies for any valid claim to American citizenship.

B. A related contention is that the Attorney General cannot pass on citizenship issues, and that when a "plausible" claim of citizenship is presented to him its resolution is exclusively a matter for the courts. Alienage, to be sure, is a jurisdictional issue in a deportation proceeding, but this does not mean that the administrative process must halt when a "plausible" citizenship claim is made. The Attorney General must determine his jurisdiction in order to complete the proceeding and arrive at a decision, at which point, of course, the party affected may seek a *de novo* determination of his citizenship claim if the administrative decision is adverse. This proposition has been settled since *United States* v. *Sing Tuck*, 194 U.S. 161.

In addition, even if petitioner's position were tenable, it would at most entitle him to *de novo* judicial inquiry; that is precisely what he has obtained in this proceeding to review the deportation order.

C. The procedure under which petitioner was interrogated and eventually arrested conformed with the statute and was entirely proper. Administrative arrests in deportation proceedings have long been authorized by statute and have been endorsed by this

Court on numerous occasions. See *Abel* v. *United States*, 362 U.S. 217. Where there is a claim of lack of probable cause for the arrest, that issue can be raised immediately by habeas corpus. Petitioner did so, but did not appeal a decision supporting the custody.

Moreover, the challenges to the arrest and detention are not relevant to the disposition of the case. The detention was ordered pending final determination of deportability. If petitioner prevails his detention will end; if he loses the deportation order will be upheld and the propriety of his arrest and detention pending determination of deportability will become moot. See *United States ex rel. Bilokumsky* v. *Tod*, 263 U.S. 149, 158.

Defects in the arrest and detention (we deny that there are any) might have a bearing on the admissibility of any evidence obtained during custody. But the only evidence possibly susceptible to such attack was a statement which was not relied on by the special inquiry officer or the district court. Petitioner's alienage and deportability were established at the deportation hearing by extrinsic evidence, unrelated to his arrest and detention.

V

Deportation was properly ordered. When petitioner lost his citizenship, he became an alien and could enter the United States only in compliance with the immigration laws. When he returned to the United States for permanent stay in 1960 he did not comply with the requirement that every immigrant must present

an immigrant visa, and consequently entered the United States in violation of law. Therefore he became deportable under Section 241(a)(1) of the Immigration and Nationality Act, 8 U.S.C. 1251(a)(1).

It is not true that petitioner could not have applied for a visa without jeopardizing his citizenship claim. His title to citizenship had already been lost, and he had been notified of the State Department's view that he no longer was an American citizen. Petitioner had many remedies to test his claim that he was still a citizen, and the procurement of a visa would not have curtailed them. Instead he chose to enter the United States furtively. There is no basis for relieving him from the generally applicable requirement for an immigrant visa.

Nor did petitioner have an unqualified right of entry into the United States because he once was a citizen. Congress can fix the standards and conditions upon which aliens may be admitted to the United States. Since the deportation order here merely effectuates the power to exclude, it is not defeated merely because petitioner, who entered in violation of law, once was a citizen.

ARGUMENT

In opposing petitioner's claim to United States citizenship the Government concededly has a heavy burden. Prerequisite to any deportation decree is a finding, supported by substantial evidence, that the person charged is an alien. *United States ex rel. Bilokumsky* v. *Tod*, 263 U.S. 149. The requirement is even more exacting when it appears that the af-

fected person once was a citizen of the United States. Under such circumstances, the decisions of this Court require that the asserted loss of such citizenship be proved by clear, unequivocal and convincing evidence. *Gonzales* v. *Landon*, 350 U.S. 920; *Nishikawa* v. *Dulles*, 356 U.S. 129.

There is no question that petitioner acquired United States citizenship through birth in the United States. However, the Government contends that he lost that citizenship by service in the armed forces of Cuba after January 1, 1959. Before addressing ourselves to petitioner's attack upon the constitutionality of Section 349(a)(3), we undertake to show that the statute applies to petitioner's case and that the strict standard of proof has been satisfied.[3]

I.

PETITIONER VOLUNTARILY SERVED IN THE ARMED FORCES OF CUBA AFTER JANUARY 1, 1959

A. PETITIONER SERVED IN THE CUBAN REBEL ARMY AFTER JANUARY 1, 1959

Although petitioner does not deny that he served in the Rebel Army of Cuba from January, 1959, to May, 1960, we note briefly the evidence identifying him as a member of that force. It is undisputed

[3] Sec. 349(c), Immigration and Nationality Act, 8 U.S.C. 1481(c), as amended by Sec. 19, Act of Sept. 26, 1961, 75 Stat. 656, changed requirements for burden of proof, specifying that loss of nationality thereafter could be established by a preponderance of evidence. However, since the administrative proceeding here was completed before this 1961 amendment, we concede, for purposes of this case, that the amended statute is inapplicable.

that during this period he was a Captain of the Rebel Army, received pay and an identity card as such, and wore its uniform with the insignia of his rank; that he was charged with various important duties, including the execution of "war criminals" condemned by military courts, the supervision of security, and the training of troops; that he was subject to command orders by military superiors, including his transfer to different posts, and that he exercised command responsibilities over substantial numbers of troops, also in the uniform of the Cuban Rebel Army. See pp. 4–6, *supra*.[4]

B. DURING THE PERIOD OF PETITIONER'S SERVICE, THE CUBAN REBEL ARMY CONSTITUTED THE ARMED FORCES OF A FOREIGN STATE WITHIN THE CONTEMPLATION OF SECTION 349(A)(1)

The record shows conclusively that petitioner and his colleagues in the Cuban Rebel Army bore arms, which were used for pacification and training, and for the execution of those condemned by the military courts (R. 158a, 159a, 172a, 215a, 218a, 221a, 123b, 186b, 187b, 212b, 245b, 311b). Therefore they certainly were an armed force. Petitioner contends, however, that the Rebel Army was not a component of the armed forces of a foreign state. We believe that contention is untenable.

Cuba's designation as a foreign state, both before

[4] The cases cited by petitioner (Pet. Br. 56) regarding inactive or reserve duty are irrelevant. It is undisputed that petitioner performed full-time, active service. *Kawakita* v. *United States*, 343 U.S. 717, is inapposite since the Court expressly found that Kawakita was serving with a private business concern and not in the armed forces of Japan. 343 U.S. at 727–728.

and after Castro's assumption of power, is not open to debate.[5] Petitioner's contention is addressed rather to the role of the Rebel Army as an agency of that state. No one has suggested that petitioner incurred any disability for his service during 1958, when the Rebel Army was an insurgent force, warring against the Batista regime. But petitioner's reentry into the Rebel Army after January 1, 1959, is quite a different matter. The assertion that during 1959 and 1960 members of the Cuban Rebel Army were not the armed forces, or a major segment of the armed forces, of Cuba utterly disregards the actual facts, which are clearly portrayed in the record.

On January 1, 1959, the Batista regime was overthrown and the Castro forces took power in Cuba. The Regular Army of Cuba was vanquished and its leaders were deposed, arrested, and in some instances executed (R. 193b, 309b). It is undisputed that the Rebel Army assumed complete power. It took over the government and systematically began to eradicate the remnants of the Batista regime. On January 2, 1959 Castro, "as Chief of the Revolution which has overthrown the tyrannical regime," was appointed "Commander in Chief of the Air, Sea, and Land Forces of the Republic of Cuba". (R. 299b).

The Regular Army of Batista was not immediately dissolved. Those of its members who were not arrested or dismissed were retained while their future usefulness was weighed. Some of them eventually were retained (R. 89a, 217a–218a, 223a–225a, 214b–

[5] See expansive definition of foreign state in Section 101(a)(14), Immigration and Nationality Act, 8 U.S.C. 1101(a)(14).

215b). But it is quite inaccurate to suggest, as petitioner does (Pet. Br. 58), that this force, vanquished and shorn of its power after January 1, 1959, comprised the armed forces of Cuba. At most it was permitted to exist, and was subordinated to the Rebel Army until both forces were merged a few months later (R. 223a, 268a). In the meantime, Castro and his chief lieutenants, including Che Guevara, were placed in command of the combined military forces. Like other defeated armies in comparable situations, the Batista Regular Army was no longer a significant factor in Cuban affairs.

The record shows that the Rebel Army was the dominant, and perhaps the only, military force of the Cuban government after January 1, 1959 (R. 163a, 200a, 223a, 225a, 215b, 234b). It controlled the weapons, forts, and military personnel, it operated the military tribunals and carried out their orders, and it was responsible for the security of the nation. Cuba would have had no effective military force after January 1, 1959 if the Rebel Army did not constitute all, or a major portion, of its armed forces. Obviously, the Castro regime did have armed forces—the triumphant Rebel Army.

Less than a week after Castro's victory, and only a few days after Castro's designation as Commander in Chief of Cuba's armed forces, the United States officially recognized the new government set up by the Rebel forces (R. 298b). The dominance of the Rebel Army soon was reflected in the decrees of the new government. Law No. 13, issued January 13, 1959, recited the "need for the urgent re-organization

of military establishments" and temporarily suspended the laws and regulations of the armed forces until such reorganization was completed (R. 256a). Law No. 100, published February 26, 1959, recited the need to consolidate and promote revolutionary gains, created various divisions of the Rebel Army, and assigned them to the Ministry of Defense to perform functions generally related to reconstruction and redevelopment of the national economy (R. 258a). An accompanying statement explained that this program was undertaken to redeem the promises made by the Rebel Army during the revolutionary struggle, that having "won the war of bullets, it is now necessary to win the war of peace", and that involvement of the Rebel Army in such civic enterprises was a "sure means of keeping the morale in the Revolutionary ranks" (R. 261a). Law 600, dated October 16, 1959, culminated this series of decrees (R. 268a). It declared that the Armed Forces as they existed before January 1, 1959 were an instrument of dictatorship, that upon "the glorious victory of the Revolution and the disintegration of the Armed Forces serving the Dictatorship, the Rebel Army inherited from them a corrupt structure", and that it was necessary to establish a new structure for the armed forces. Law No. 600 then proceeded to establish a Ministry of the Revolutionary Armed Forces having jurisdiction over all the armed forces of the nation and to dissolve the Cuban Army and Navy and constitute the Rebel Army, Air Force, Navy and National Police "as integral corps of the Revolutionary Armed Forces". Members of existing forces who had not been dis-

missed were to retain their military status. "In like manner, members of the Rebel Army and other persons rendering real and effective service in any of the Armed Forces of the Nation, shall retain their military status".

In short, Law No. 600 consummated the course of events which commenced on January 1, 1959. It completed the dissolution of the remnants of the Regular Army; it confirmed the dominance of the Rebel Army in the nation's armed forces after January 1, 1959; and it recognized the Rebel Army and other designated groups as elements of the armed forces.

This depiction of the situation in Cuba was corroborated by the testimony of a number of witnesses with first-hand knowledge. One of these, an expert on Cuban law named Dr. Mestre, testified that Law No. 600 merely recognized an existing fact, that in effect the Rebel Army was the only one in Cuba after Castro took over, and that Castro was commander of all military forces, "both of what remained of the former army, which had been more or less crumbling or demoralized, plus the new Rebel Army. It was all more or less one thing" (R. 91a). A former Captain of the Regular Army who was retained after Castro took over, one Ball-Llovera, testified that after January 1, 1959, only the Rebel Army existed as a military force and exercised authority, and that any remaining members of the Regular Army were subordinated to the Rebel Army and its officers (R. 218a). Two former Captains in the Rebel Army named Roger Redondo Gonzalez and De

La Torre similarly testified that after January 1, 1959, only the Rebel Army exercised authority and represented the Government (R. 200a, 223a–225a).

2. Petitioner's rejoinders are unconvincing. First, he asserts that the evidence of rank, chain of command, and uniforms does not distinguish the Rebel Army from the Boy Scouts or the Salvation Army. But the Boy Scouts and the Salvation Army are not an agency of a foreign state charged with its national security; nor are they equipped with rifles, bayonets, pistols, and machine guns; nor do they have squads of soldiers who execute prisoners condemned by military courts.

Petitioner also suggests that his employment was like that of a peace officer or prison guard. But again this suggestion ignores the actualities of his service in a military force, in military fortresses, and under military orders. His situation was quite similar to that of an officer under direction of the Provost Marshal General in the United States Army. See 10 U.S.C. 3039(b).

Next, petitioner argues that an armed force is "characteristically an armed body of men organized for the purpose of waging or preparing to wage war". (Pet. Br. 55). However, Section 349(a)(3) merely refers to service in "the armed forces of a foreign state" without further definition. There is no suggestion that Congress referred to armed forces only when and as engaged in particular tasks.[6]

[6] The term "armed forces" appears also without further definition, at other points in the Immigration and Nationality Act. Sec. 101(d)(1), 8 U.S.C. 1101(d)(1) (definition of vet-

Combat and preparation for combat are of course central functions of the military. It is also plain that the massive standing armies throughout the world are not today engaged in combat. In large measure they

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eran); Sec. 212(a)(22), 8 U.S.C. 1182(a)(22) (exclusion of alien draft evaders); Sec. 284, 8 U.S.C. 1354 (facilitates entry and departure of alien members of armed forces); Sec. 314, 8 U.S.C. 1425 (caption) (alien deserters ineligible to citizenship); Sec. 315, 8 U.S.C. 1426 (aliens relieved from military service ineligible to citizenship); Sec. 327, 8 U.S.C. 1438 (expeditious renaturalization of persons who lost citizenship by service in allied armies during World War II); Sec. 328, 8 U.S.C. 1439 (special naturalization benefits for alien veterans); Sec. 329, 8 U.S.C. 1440 (caption) (special naturalization benefits for aliens with active service in armed forces during World Wars and Korean hostilities); Sec. 337, 8 U.S.C. 1448 (oath of allegiance, permits conscientious objectors to agree to perform noncombatant service in armed forces); Sec. 349, 8 U.S.C. 1481 (par. (3) involved here; pars. (8) and (10), which deal with loss of citizenship for desertion and avoiding military service in the "military, air, or naval forces of the United States" were declared unconstitutional by this Court in *Trop* v. *Dulles*, 356 U.S. 86 and *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144); Sec. 354, 8 U.S.C. 1486 (relief from loss of nationality of certain alien veterans residing abroad).

The term "armed forces" is also used in many statutes other than the Immigration and Nationality Act, generally dealing with the armed forces of the United States. See Index to United States Code, 1958 Ed., and Supplements, "Armed Forces". In some instances the term is defined (usually as including the Army, Navy, Air Force, Marine Corps, and Coast Guard). (10 U.S.C. 101(4); 22 U.S.C. 2403(b); 26 U.S.C. 7701(a)(15); 32 U.S.C. 101(2); 50 U.S.C. App. 466(c); see broader definition in 36 U.S.C. 945); in other instances it is undefined (see 12 U.S.C. 1748 h-1); cf. 12 U.S.C. 1748(f). In at least two other instances statutes have referred, without definition, to the armed forces of a foreign state (50 U.S.C. App. 456(a) (exemption from selective service obligations); 19 U.S.C. 193a (now repealed) (exemptions from customs liability)).

are presently useful as a symbol of power and a deterrent to aggression. Various nations use their armed forces in different ways, as garrison troops, to silence opposition and quell internal disorder, and to advance various national objectives, at home and in other countries. Under petitioner's "combat" formula, large portions of the military establishments of countries like Soviet Russia, Communist China, or Cuba would not be regarded as part of their armed forces. This is absurd on its face and certainly not required by either the language or the purpose of Section 349(a)(3). Although other sections of the Immigration and Nationality Act dealing with military service sometimes have used qualifying language, *e.g.*, in requiring that service be "in active-duty status"[7] or "honorable"[8] or "in time of war"[9], no qualification of any kind appears in Section 349(a)(3). There is no basis for inserting restrictions which were not made by Congress.

A related contention is that the Rebel Army was not part of Cuba's armed forces because it was assigned certain "civic" responsibilities concerned generally with national reconstruction and rehabilitation. The answer again is that the statute does not depend for its operation upon the manner in which a nation uses its military personnel. The only question is whether the individual concerned was a part of the armed forces. The record shows that the Rebel Army was and remained the armed force of Cuba;

[7] Secs. 101(d)(1) and 329, 8 U.S.C. 1101(d)(1) and 1440.
[8] Secs. 328 and 329, 8 U.S.C. 1439 and 1440.
[9] Secs. 212(a)(22) and 314, 8 U.S.C. 1182 and 1425.

that the civic responsibilities were assigned because the national leaders deemed it appropriate that they be performed by the military; that a large part of the Rebel Army remained in its quarters and was not involved in these civic tasks (see R. 291a); that the entire Rebel Army retained its status as such—with uniforms, rank, pay, arms, and chain of command; that some of the civic duties were assigned to the less desirable members of the military forces; and that petitioner himself was for the most part involved in strictly military duties, such as military security, the execution of those condemned by military courts, and the training (*e.g.*, R. 193a, 141b) and command of troops.

We note in this connection that the United States military forces often have been engaged in what petitioner regards as "nonmilitary" pursuits. Thus the Corps of Engineers, a branch of the United States Army (10 U.S.C. 3038, 3063), does "civic" work in controlling rivers and beaches, and supervising the construction of bridges and dams. 33 U.S.C. 426–426h, 525, 541, 16 U.S.C. 460d, and 665a. The Army and Navy have governed many of our insular possessions in the past, and the Navy still governs some. *E.g.*, see annotations of 48 U.S.C. 1, 1421, 1431 and Geographic Report No. 4, dated February 7, 1963, entitled "United States and Outlying Areas," issued by the Geographer, Department of State. And our military forces were deeply involved in the government of Germany and Japan after our victory in World War II. Indeed some of the functions they performed then, including the trial and punishment of war

criminals and the policing and rehabilitation of the conquered nations, closely parallelled those of the Rebel Army after its victory in Cuba. See *In re Yamashita*, 327 U.S. 1; *Madsen* v. *Kinsella*, 343 U.S. 341.

Petitioner also suggests that the Cuban Regular Army, rather than the Rebel Army, fits the description "armed forces." As we have shown, the former group, to the extent that it was permitted to exist for a few months after January 1, 1959, was subordinate to the Rebel Army. In similar vein, petitioner refers to the Cuban militia. Although there is little in the record concerning this group (see R. 226a–227a), its status patently cannot detract from the conclusion that the Rebel Army was a dominant component of the armed forces of Cuban during the critical period.

3. Finally, we point out that on a number of occasions petitioner has acknowledged that he served in the military forces of Cuba after January 1, 1959. Thus, he is described as a Captain in Fidel Castro's revolutionary army in the February 23, 1960 article in the *Havana Times* written by his friend Jean Secon,[10] based on an interview with him and repre-

[10] Jean Secon is shown throughout the record as closely identified with petitioner. She wrote the *Havana Times* interview under her name (R. 282a), and the *Cavalier* magazine article under petitioner's name (R. 179–180a, 133b, 319b). She and petitioner were close friends in Cuba (R. 227b–228b) and they escaped from Cuba together (R. 132a–133a, 70b). She apparently was present in petitioner's apartment when immigration officers came to question him in 1961 and advised him at his interrogation at immigration headquarters (R. 60a, 71a, 76a, 136a, 3b, 6b, 31b). She was present at much of his deportation hearing, although petitioner did not call her as a witness.

sented by him to be true (R. 282a, 127a–130a, 66b–68b). He is described as a military officer in command of 7000 troops in his 1961 statement to immigration officers [11] (R. 304). He is described as a military officer in charge of executing war criminals, and as subsequently performing various military functions, in a magazine article titled "I Was Castro's Killer", which appeared under his name, although written by Jean Secon, in *Cavalier Magazine* in December 1960, after his arrival in this country. He vouched for the truth of the statements in this article (R. 308b, 182a–183a, 133b). He is shown in the Rebel Army uniform and insignia in two photographs in the record (R. 280a, 328b). He told one witness that he was "in the tactical forces * * * [o]f the Rebel Army" (R. 227b). And in the hearing he admitted being an officer in the Rebel Army after January 1, 1959, during a period when it was the dominant military force of Cuba (R. 160a–163a). Thus, the evidence (including petitioner's own accounts) compels the conclusion that the Rebel Army was part of Cuba's "armed forces," both *de facto* and *de jure*, after January 1, 1959.

[11] In the deportation hearing petitioner raised some questions concerning the circumstances under which this statement was taken (R. 81a). The facts it recites are established by overwhelming independent evidence and neither the special inquiry officer nor the district court found it necessary to rely on the statement (R. 363b, 203 F. Supp. at 392). Petitioner has not raised any question concerning this statement in this Court. We refer to it here and elsewhere only as a demonstration of a cumulative pattern.

C. PETITIONER'S SERVICE WAS VOLUNTARY

Petitioner urges that, even if he did serve in Cuba's armed forces, his service was not voluntary. We agree, of course, that voluntariness is an essential ingredient of expatriation. As to the burden of proof on this issue, the Chief Justice observed in *Nishikawa* v. *Dulles*, 356 U.S. 129, that "the citizenship claimant is subject to the rule dictated by common experience that one ordinarily acts voluntarily". However, "whenever the issue of voluntariness is put in issue, the Government must in each case prove voluntary conduct by clear, convincing and unequivocal evidence", 356 U.S. at 136, 138. At the same time, these observations must be read in context. Nishikawa was conscripted in a totalitarian country to whose conscription law, with its penal sanctions, he was subject; and this alone put in issue his voluntariness. See 356 U.S. at 153. There is no showing that Cuba had any conscription law at the time of petitioner's service and, even if it had such a law, there is no intimation that petitioner, an American citizen who did not have Cuban nationality, would have been subject to such conscription. We believe petitioner's self-serving assertions have not demonstrated any compulsion and that he has not actually put voluntariness in issue. However, even on the contrary assumption, we submit that the burden of proof imposed by *Nishikawa* has been met and that the record conclusively shows that petitioner's service in the armed forces of Cuba was voluntary.

Petitioner's claim of involuntariness rests on his own unsupported testimony that he returned to Cuba for a reunion with his comrades in the Rebel forces

after they had triumphed; that Che Guevara ordered him to take the post as officer in charge of security at La Cabana; and that he did not refuse "[b]ecause that's plain suicide by refusing an order from Che Guevara" (R. 150a–153a, 88b–92b).

This account was given for the first time at the deportation hearing. It is uncorroborated and in conflict with the facts developed in the record. The district court found it "incredible". 203 F. Supp. at 393.

There is not even a whisper of coercion in the written prehearing documents attributable to petitioner. First, there is the *Havana Times* article of February 23, 1960 written by petitioner's friend, Jean Secon, and certified by him as an accurate account of his statements. It declares that, following the fall of Batista, Marks became a captain of the guard at La Cabana fortress and it describes his sympathy with the Rebel aims (R. 282a). Since this article was written while petitioner was still in Cuba, it may be argued that he would not wish to suggest reluctance. This is not true, however, of the December, 1960 article in *Cavalier Magazine* ("I Was Castro's Killer"), which appeared under petitioner's signature and was written after his return to the United States (R. 308b). Not only is there no hint of any coercion in this article, but it tells how he returned to Cuba, "rejoining my unit in Havana on the third of January". It goes on to say, "On my return to active duty, Che made me security officer of Cabana". It spoke of his heavy responsibilities as security officer, including the execution of 79 "war criminals", justifying

these killings on the basis of "murders and atrocities committed by some of the condemned" and "the knowledge that these executions were not only justified but necessary." Finally, there is petitioner's statement to immigration officers on January 25, 1961, before the deportation proceedings were commenced (R. 304b–307b). Again there is no mention of coercion, and petitioner says he was "Second in Command of Cabana Fortress and was Chief Security Officer of the Regiment * * * I returned to combat duty on January 3rd or 4th, 1959."

Petitioner's own testimony at the hearing also undermines his present claim of duress. When Castro prevailed, petitioner was in the United States. No one compelled him to return to Cuba. He went of his own free will. In Cuba he immediately located his former command, installed in La Cabana fortress. From there he went to his former commander, Che Guevara, at the Presidential Palace, where he was enthusiastically received. All of those events indicate that petitioner was ready to participate further in the activities of his former cohorts—a conclusion further confirmed by his testimony that in returning to Cuba he hoped to obtain a land grant as a member of the Rebel Army, from which he "could have secure and permanent income" (R. 134b–135b).

The circumstances of petitioner's service in the Rebel Army after January 1, 1959, are also incompatible with the claim of duress. We have already noted the warmth of his welcome and his immediate assignment to a high security position, in charge of the execution of "war criminals". Such a display of

confidence hardly would be offered to an unwilling or "impressed" (to use petitioner's term) outsider. Another indicium is his assignment to other security responsibilities, including a return to Havana in 1960 where he admittedly held a position of trust and responsibility at El Principe (see R. 283a). Finally, involuntariness is negated by the enthusiasm with which petitioner performed his duties as Castro's executioner. This is reflected in the *Cavalier Magazine* article, in which petitioner justifies the executions. It is portrayed more vividly in the testimony of the witness Algaze, who, as Public Defender, was charged with the defense of those tried as war criminals (R. 174b). He saw petitioner at La Cabana every day for a period of months, dressed in the uniform and insignia of a Captain of the Rebel Army (R. 177b–178b). Petitioner gave the orders to the firing squads and would finish off the prisoners after the firing squads were through (R. 186b–187b). Petitioner mocked and terrorized the prisoners, who called him "the Death-Bird" (R. 197b). Petitioner would wait outside the tribunal for announcement of the death sentence, then "he would die of laughing", and would immediately take the prisoner off to be executed (R. 188b). On one occasion the firing squad refused to execute a Major Capote. Petitioner picked up a machine gun and himself killed Capote and seven other former members of the Regular Army, placing the firing squad under arrest (R. 193b–194b).[12]

[12] Some of the testimony of this witness—*e.g.*, petitioner's personal execution of prisoners—is corroborated in petitioner's article (R. 309b, 311b). The testimony concerning mistreat-

Other indicia of voluntariness are found in petitioner's failure to object to his military service. Petitioner claims that protests would have been futile and that he feared they would subject him to punishment. Yet he acknowledged that other Americans left the Rebel Army and that he knew of no instances where Americans were prevented (R. 190a, 138b).[13] In the light of the cordial relationship between him and the Rebel leaders, it is inconceivable that he could not have informed them that he had come back only to pay a visit and that, since the Revolution had succeeded, he was no longer interested in military service and planned to return to his home in the United States. His failure to make such a representation and the enthusiasm with which he thereafter performed his duties tell us eloquently that his military service after January 1, 1959 resulted from voluntary choice.

According to petitioner he once sought a discharge early in 1959 "because of the conditions which prevailed" (not because he was opposed to service), but this was refused by Che Guevara (R. 191a–192a). Even if this statement were credited, it indicates that petitioner had no fear of communicating his wishes to Che Guevara and that he would have had no difficulty in objecting to the military service at its outset. The only satisfactory explanation of his conduct is that he welcomed his new assignment.

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ment of prisoners is confirmed to some extent by a former Cuban judge, named Alabau, who investigated complaints against petitioner (R. 204b).

[13] The *Havana Times* article of February 23, 1960, referred to petitioner as "one of the few remaining Yanks serving in the Cuban Revolutionary forces" (R. 282a).

It is also significant that petitioner continued to serve in the Rebel Army for almost a year and a half. During this time, except for the single alleged conversation with Che Guevara, he made no effort to terminate his military service. Petitioner was frequently in communication with the American Consul, Mr. Kessler, but he never solicited the aid of the American Embassy, never sought asylum in the Embassy, never indicated to Mr. Kessler or the Embassy that his service in the Rebel Army was involuntary, and never voiced any objection to or dissatisfaction with his military service (R. 161a, 103b, 114b–116b, 120b).[14] In February 1960, petitioner was served by a representative of the American Embassy with a Certificate of Loss of Nationality (R. 166a, 255a, 297b). Although he then stated he would oppose his loss of citizenship, he never made any formal objection to the administrative action and never contended, through any contemporaneous written or oral expression, that his service in the Rebel Army was compelled (R. 167a–168a, 120b).

If petitioner was unhappy with his service in the Rebel Army, it would have been a relatively easy matter for him to have left Cuba, particularly in the early months. Travel between Cuba and the United

[14] Mr. Kessler's testimony was received by stipulation in the district court (R. 33a). It is not reproduced in the printed transcripts but appears in Exhibibt 1, p. 145–146, of the original record lodged with this Court. In it, Mr. Kessler confirms that he saw petitioner frequently in Cuba and that at no time did petitioner request assistance or asylum from the United States Government, or state to Mr. Kessler that he had been forced to enter into or serve in the Cuban Rebel Army.

States was relatively free, and a Cuban named Roger Redondo Gonzalez, who had been a Major in the Rebel Army, testified that he had been to Miami in January or February, 1959 and had gone to Tampa early in January, 1960 to pick up toys for his children (R. 230–231b). Petitioner has testified that he enjoyed freedom of movement while stationed in Havana in 1959 and 1960 (R. 121b–122b; see also R. 226b–228b), and that he was able to visit Havana on a number of occasions while he was stationed in the provinces (R. 126b–127b). In this year and a half petitioner made no effort to leave Cuba, until he made his successful escape, achieved with relative ease on the first attempt, in May 1960 (R. 186a). And we note that, when he finally decided to escape, his professed motivation was that he was in disfavor and facing arrest and not that he wished to be free of coerced military service (R. 132a).

Petitioner's claim that he was in jeopardy because of open anti-Communist activity on his part (R. 123a–125a, 313b–314b) is not corroborated by the record. His transfer from La Cabana occurred when the executions of Castro's early months had lessened. It was followed by transfer to other areas where his services were used. Moreover, petitioner's account conflicts with the known facts—his service for a year and a half without molestation, at a time when other dissidents were being arrested (R. 131a, 292b–294b); his admitted freedom of movement; and his continued assignment to responsible posts, including one at El Principe in Havana in 1960 (R. 125a, 283a). In any event, his alleged disillusionment and professed anti-

Communism after he voluntarily commenced to serve in the Cuban armed forces are not relevant. The issue is whether he undertook that service voluntarily.

For the same reason, the cases cited by petitioner (Pet. Br. 44–45), relating to involuntary continuation of service, are inapt. They relate to military service commenced when it did not cause expatriation, and continued thereafter because the person was unable to get out. We fully agree that such continued service would be involuntary.[15] But those cases have no possible application to military service which was voluntarily commenced at a time when it would result in expatriation.

II

PETITIONER'S VOLUNTARY SERVICE IN THE ARMED FORCES OF CUBA RESULTED IN HIS EXPATRIATION UNDER THE TERMS OF SECTION 349(A)(3) OF THE IMMIGRATION AND NATIONALITY ACT.

As argued above, petitioner served in the armed forces of a foreign state after January 1, 1959. Such service admittedly was not authorized in writing by the Secretary of State and the Secretary of Defense (R. 1b). Consequently petitioner was expatriated under the terms of Section 349(a)(3) of the Immigration and Nationality Act.[16]

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[15] Section 349(a)(3) takes into account such a situation in specifying that military service commenced when under 18 will result in expatriation only if there was opportunity to obtain release from such service after 18th birthday.

[16] The statute prescribes for loss of United States nationality by "entering, or serving in, the armed forces of a foreign state". We are relying here solely on petitioner's "service", which is amply established and is itself sufficient to cause expatriation. This also was the approach adopted by the special

Petitioner suggests that, in order to avoid constitutional questions, the Court should construe Section 349(a)(3) as being inoperative in the absence of an affirmative intention to renounce American nationality. We suggest that such a construction would avoid constitutional questions only by emasculating the statute and ignoring the obvious thrust of its language, structure and purpose. It would in effect read Section 349(a)(3) out of the law, since it would make that provision depend on the unlikely contingency that the person affected would concede that he had desired the loss of his American citizenship. And it would likewise nullify, for virtually all practical purposes, the statutory edicts relating to loss of citizenship by voting ((a)(5)), naturalization ((a)(1)), oath of allegiance ((a)(2)), employment by a foreign state ((a)(4)), and residence in a foreign state (Section 352).

When Congress wished to make relevant the motive to forsake citizenship, it had no difficulty in expressing itself, as it did in Section 349(a) (6) and (7), which authorize the formal renunciation of United States citizenship. The omission of any similar directive in 349(a)(3) clearly shows that Congress did not wish to prescribe it. Indeed, the construction urged by petitioner would make subsection (a)(3) largely superfluous, since formal renunciation could be accomplished under subsection (a)(6).

The plain meaning of the statute is confirmed by its legislative history. Provision for loss of nationality

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inquiry officer, the Board of Immigration Appeals, the district court, and the court of appeals.

through foreign military service was enacted for the first time in 1940. Theretofore, foreign military service did not expatriate, unless it was coupled with an oath of foreign allegiance. 39 Op. A.G. 337; *United States ex rel. De Cicco* v. *Longo,* 46 F. Supp. 170, 174 (D.C. Conn.). It was proposed, however, by the Cabinet Committee which drafted the Nationality Act of 1940 (*Codification of Nationality Laws of the United States,* House Committee Print, 76th Cong., 1st. Sess., Part 1, p. 66–67) that nationality be lost by

> Entering, or serving in, the armed forces of a foreign state unless expressly authorized by the laws of the United States * * *.

The resemblance of this proposal to the statute in its present form is apparent. In presenting its proposal the Cabinet Committee commented:

> This provision is based upon the theory that an American national who, after reaching the age of majority * * * voluntarily enters, or continues to serve in, the army of a foreign state, thus offering his all in support of such state, should be deemed to have transferred his allegiance to it. * * *

This proposal was adopted, without comment or change, by the House Committee in reporting the proposed Nationality Code. H. Rep. 2396, 76th Cong., 3d Sess., p. 82. The Senate Committee revised it by adding a clause restricting it to dual nationals. Its version stated that one serving in a foreign army would lose his United States citizenship only "if he has or acquires the nationality of such foreign state". S. Rep. 2150, 76th Cong., 3d Sess. The Senate Committee explained (pp. 3–4):

> The loss of American nationality would result not only from obtaining naturalization in a foreign state, or by the taking of an oath of allegiance or making an affirmation or other formal declaration of allegiance to a foreign country, but also from entering or serving in foreign military forces if thereby nationality in such foreign country is obtained, accepting employment under a foreign government for which its nationals only are eligible, or voting in a foreign political election or plebiscite.

The provision in question was enacted in this form as Section 401(c) of the Nationality Act of 1940, 54 Stat. 1137, 1169.

In the comprehensive study which preceded the Immigration and Nationality Act of 1952, the Senate Judiciary Committee referred to the 1940 Act's provisions for expatriation through foreign military service, and pointed out that this "general rule of expatriation by entering foreign military service is modified by certain Executive Agreements made by the President with foreign countries which permit foreign service without expatriation". S. Rep. 1515, 81st Cong., 2d Sess., p. 749. The report then went on to state:

> The subcommittee feels that the provisions covering loss of nationality through service in the armed forces of a foreign country should be uniform and should not be dependent upon foreign law, and therefore is recommending changes in this subsection designed to effect such uniformity.

As we have noted, the statute's language was restored to a form similar to that in the original draft of the

1940 Act, eliminating the provisions restricting its operation to dual nationals. This proposal was approved in the final reports of the House and Senate Committees, which stated that the committees proposed to continue, with modifications, "the provisions of the Nationality Act of 1940 relating to acts which cause loss of nationality". S. Rep. 1137, p. 46, H. Rep. 1365, p. 83, 82d Cong., 2d Sess. The committees then stated (*ibid.*):

> The next act causing loss of nationality is entering or serving in the armed forces of a foreign state unless expressly authorized to do so by the laws of the United States. The bill requires, in lieu of general authorization, that a specific authorization in writing must be made by the Secretary of State and the Secretary of Defense before a national of the United States may enter or serve in the armed forces of a foreign state without losing his status as a national of the United States. * * *

The recommendations of the Committee were enacted as Section 349(a) (3).[17]

We cannot find in this legislative history the slightest support for a hypothesis that foreign military service was to expatriate only if there was an affirmative wish to shed American citizenship. That hypothesis is unmistakably rejected by all guides to legislative purpose, which tell us that Congress intended that the unsanctioned military service itself

[17] Between 1953 and 1962, loss of citizenship through foreign military service was incurred by 3,591 American citizens. 1962 Annual Report, Immigration and Naturalization Service, p. 101.

was to cause expatriation. Moreover, we have noted that in the 1952 Act Congress eliminated the previous requirement that loss was to occur only "if he has or acquires the nationality of such foreign state". In the light of this excision, we can perceive no sound basis for a supposition that Congress intended another, and unexpressed, restriction on loss of nationality through foreign military service. The irrelevance of subjective desire is also shown by the provision that citizenship status will be preserved only if the prior consent of the Secretary of State and Secretary of Defense is obtained.

Petitioner cites no cases which support his hypothesis.[18] None of the numerous decisions dealing with expatriation through foreign military service turned on the citizen's subjective intent. Moreover, petitioner's hypothesis is directly opposed to this Court's holdings in *Mackenzie* v. *Hare*, 239 U.S. 299, *Savorgnan* v. *United States*, 338 U.S. 491, and *Perez* v. *Brownell*, 356 U.S. 44. Mrs. Mackenzie wished to marry an alien; Mrs. Savorgnan wished to be naturalized in a foreign state in order to marry an alien; and Mr. Perez wished to vote in a foreign election. Each disclaimed any intention to renounce American citizenship, but in each instance this Court deemed their desires and preferences immaterial, and found that citizenship had been lost by the voluntary acts. As stated in *Savorgnan* (338 U.S. at 499–500):

[18] The cases he cites (Pet. Br. 33–34) are clearly inapplicable. One concerns whether a dual national elected Canadian citizenship. The other deals with conscripted service found to be involuntary.

> [T]he acts upon which the statutes expressly condition the consent of our Government to the expatriation of its citizens are stated objectively. There is no suggestion in the statutory language that the effect of the specified overt acts, when voluntarily done, is conditioned upon the undisclosed intent of the person doing them.

Petitioner suggests (Pet. Br. 32–33) that the above cases can be distinguished because they relate to dual nationals,[19] and did not result in statelessness. There is no basis for any such distinction in the rationale of the prevailing opinions. To read this statute to exclude subjective intent for dual nationals and to require it for others would require a semantic feat, unwarranted by the language or history.

III

SECTION 349(a)(3) IS CONSTITUTIONAL

In a number of recent cases, the Government has submitted briefs exploring the power of Congress to fix grounds for expatriation and the limitations on that power. *E.g., Kennedy* v. *Mendoza-Martinez*, No. 19, October Term, 1961. We proceed here upon the premise that the power exists and undertake to show that the limitations have not been transgressed by the statute in question.

A. THE STATUTE DOES NOT IMPOSE PUNISHMENT

The main burden of petitioner's constitutional argument rests on the assertion that "Section 349(a)(3)

[19] Of course, only Perez was actually a dual national. Mrs. Mackenzie and Mrs. Savorgnan lost their American citizenship upon performance of the expatriating acts, acquiring foreign nationality at that point.

is penal in form, purpose, and application" (Pet. Br. 15). From this premise he argues that the punishment allegedly inflicted by the statute offends the Eighth Amendment's edict against cruel and unusual punishment and also the procedural safeguards of the Fifth and Sixth Amendments. See *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144. We dispute the premise.

1. In none of the legislative materials cited by petitioner is there even the faintest intimation of a punitive design. On the contrary, the history shows that Congress was concerned with the international complications which may result from military service by Americans in the armed forces of a foreign state, and that it regarded such conduct as inconsistent with the obligations of American citizenship. We have already cited a portion of the legislative background (pp. 38–41), and we revert to the matter *infra* (pp. 54–58). Here we merely refer to the legislative materials cited by petitioner (Pet. Br. 20–22).

One is the 1938 statement of the Cabinet Committee in transmitting the proposed Nationality Code to the President. It said that the new expatriation provisions were not "designed to be punitive" and

> are merely intended to deprive persons of American nationality when such persons, by their own acts, or inaction, show that their real attachment is to the foreign country and not to the United States.

Codification of the Nationality Laws of the United States, House Committee Print, 76th Cong., 1st Sess., Part 1, p. VII. In commenting on the proposed expatriation provision relating to foreign military

service, the Cabinet Committee observed (*id.* at 68) that a citizen who served in the armed forces of a foreign state,

> thus offering his all in support of such state, should be deemed to have transferred his allegiance to it.

The same thought is expressed in the testimony of the State Department's Richard Flournoy, one of the chief architects of these provisions:

> it does not seem reasonable that a person should give himself up and risk his life for the good of a foreign state and remain a citizen of the United States.

Hearings on H.R. 6127, superseded by H.R. 9980, 76th Cong., 1st Sess., p. 131. There is no suggestion of a punitive aim in these utterances, in the other materials cited by petitioner, or in any other materials we have found.

We agree that the label of a law is not conclusive in determining its character, *Trop* v. *Dulles*, 356 U.S. 86, 94, but it remains true "that only the clearest proof could suffice to establish the unconstitutionality of a statute on such a ground." *Flemming* v. *Nestor*, 363 U.S. 603, 617. Here, far from being able to show that "the evident purpose of the legislature" (*Trop* v. *Dulles*, 356 U.S. at 96) was to impose punishment, petitioner is reduced to bare assertion.

Petitioner's reliance on the majority opinion in *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, and the Chief Justice's plurality opinion in *Trop* v. *Dulles*, *supra*, is misplaced. *Mendoza-Martinez* involved evasion of selective service obligations under a statute which "does not reach any conduct not otherwise

made criminal by the selective service laws."[20] More importantly, the relevant history persuaded the majority "that Congress in these sections decreed an additional punishment for the crime of draft avoidance."[21] This conclusion was reached only after analysis of an extensive background, going back many years. There are no comparable indicia of a penalty here.

The plurality opinion in *Trop* v. *Dulles* likewise found, on the basis of the statute itself and its history, that: "Here the purpose is punishment, and therefore the statute is a penal law. * * * There is no other legitimate purpose that the statute could serve." 356 U.S. at 97. The expatriation provision for desertion was activated only by conviction by a court martial, and the plurality opinion found that expatriation was superimposed as an additional penalty. Again there is no such showing here.[22]

Unlike *Mendoza-Martinez* and *Trop* the expatriation mandate here does not parallel or supplement the punishment for an offense under the criminal laws. While the absence of a concomitant criminal penalty is not dispositive, it is significant in assaying the purpose of the statute. See *Kennedy* v. *Mendoza-Martinez, supra,* 372 U.S. at 167, note 21, 168, 170 (note 30), 191 (note 5) (concurring opinion). Elsewhere, Congress has enumerated many criminal of-

[20] 372 U.S. at 191, note 5 (concurring opinion).

[21] 372 U.S. at 184.

[22] Section 349(a)(3) obviously does not become penal legislation because the deportation laws authorize temporary confinement pending a determination of deportability. See *Wong Wing* v. *United States*, 163 U.S. 228, 235, *Carlson* v. *Landon*, 342 U.S. 524, and discussion *infra*, pp. 75–76.

fenses involving infringement of foreign policies and programs of the United States (*e.g.*, 18 U.S.C. 951–968), but the conduct described in Section 349(a)(3) has never been designated a penal offense.[23]

2. Lacking any firm support in the legislative design or history, petitioner leans heavily on his plea that expatriation leaves him stateless (although it may not affect others in that way) and that he therefore is subjected to cruel and unusual punishment. But again petitioner misapprehends the plurality opinion in *Trop* v. *Dulles*, *supra*. The Chief Justice first found that the statute there under consideration imposed punishment, and he then concluded that this punishment, resulting in statelessness, was cruel and unusual. 356 U.S. at 99. Since Section 349(a)(3) is not a penal statute, there is no punishment whatever.

Petitioner's supposition that statelessness is necessarily to be equated with punishment does not seem reasonable when it is realized that a person who voluntarily renounces United States nationality under Section 349(a) (6) or (7) may thereby render himself stateless. Similarly a person who loses his nationality by oath of allegiance under Section 349(a)(2) may not acquire the nationality of another state. Nor does it

[23] Cf. 18 U.S.C. 959, which punishes enlistment *in the United States* in the service of a foreign government. There is no evidence that petitioner has violated this statute, and the legislative materials do not suggest, in any event, that Section 349(a)(3) was intended to complement 18 U.S.C. 959. Indeed, it appears the latter statute does not reach those who, like petitioner, enlisted abroad (Pet. Br. 29), while 349(a)(3) appears to be concerned primarily with those enlisted abroad.

appear that petitioner's position would be more favorable if he had taken advantage of the special privileges accorded veterans of the Rebel Army and had become a naturalized citizen of Cuba.[24] Whether he lost his American citizenship through military service or naturalization he would now be a refugee from Cuba, and unable to return to that country.[25]

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[24] Although there is no evidence in the record that petitioner became a naturalized citizen of Cuba, it appears that the Castro Government extended liberal naturalization benefits to alien members of the Rebel Army. R. 263a-267a. The severance of diplomatic relations with Cuba has precluded any check on petitioner's testimony that he did not take an oath of allegiance or obtain naturalization in Cuba.

[25] Petitioner hardly will be set adrift on an uncharted sea. He can be deported only to a country that will accept him. Section 243(a), Immigration and Nationality Act, 8 U.S.C. 1253(a); *United States ex rel. Tom Man* v. *Murff*, 264 F. 2d 926 (C.A. 2). And he cannot be sent to a country where he would be subject to physical persecution. Section 243(h), Immigration and Nationality Act, 8 U.S.C. 1253(h). As we shall show, the administrative proceedings thus far have considered only petitioner's deportability and not the place for his deportation (see p. 87, note 54). However, as matters now stand, it may transpire that no other country will accept him as a deportee, so that his situation as a stateless person in other countries may never arise. If this should occur, he would continue to remain in this country and ultimately might be able to regularize his status here by relief under Section 244 of the Immigration and Nationality Act, 8 U.S.C. 1254, or under some other legislation.

If petitioner left the United States and sought to return as an immigrant, he would be entitled to nonquota status, since he was born in the United States and last resided in Cuba. Secs. 202(a)(3), 101(a)(27)(C), Immigration and Nationality Act, 8 U.S.C. 1152(a)(3), 1101(a)(27)(C). However, if he seeks to reenter after deportation, he would need discretionary permission to reapply for entry. Section 212(a)(17), Immigration and Nationality Act, 8 U.S.C. 1182(a)(17). And he apparently would be inadmissible for prior conviction of a crime

Statelessness, we agree, is a severe consequence and results in an undesirable ambiguity of status. The status develops under the laws of many countries,[26] and the conditions that create it can sometimes be alleviated by legislative action.[27] But the severity of the consequence does not demonstrate the statute's unconstitutionality when there is no punitive intent. Cf. *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 169, with *Flemming* v. *Nestor*, 363 U.S. 603, 616.

The problems of statelessness belong in the realm of policy and not of power. Under our laws, citizens and aliens are subjected to many far-reaching, and sometimes onerous, consequences which are not "punishment" in the constitutional sense: the expulsion of aliens,[28] denaturalization,[29] liability to selective military service,[30] high taxes,[31] restrictions on travel

involving moral turpitude (see p. 81), unless he procured a discretionary waiver of such inadmissibility under Section 212 (c) or (g) of the Immigration and Nationality Act, 8 U.S.C. 1182 (c) or (h).

[26] As we point out at p. 60, n. 39, *infra*, the laws of a number of countries prescribe loss of nationality as a consequence of foreign military service by their nationals.

[27] See authorities collected in *Perez* v. *Brownell*, 356 U.S. 44, 64 (dissenting opinion); *Trop* v. *Dulles*, 356 U.S. 86, 102 (plurality opinion); *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 161.

[28] *Fong Yue Ting* v. *United States*, 149 U.S. 698, 730; *Mahler* v. *Eby*, 264 U.S. 32, 39; *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 594–595; *Galvan* v. *Press*, 347 U.S. 522, 530–531.

[29] *Johannessen* v. *United States*, 225 U.S. 227; *Luria* v. *United States*, 231 U.S. 9.

[30] *Selective Draft Law Cases*, 245 U.S. 366, 378.

[31] *Helvering* v. *Mitchell*, 303 U.S. 391, 397–401.

abroad,[32] restraints on the use and enjoyment of property,[33] civil disabilities resulting from misconduct,[34] etc. None of these exacting liabilities or obligations is punishment, in the constitutional sense, in the absence of an explicit penal design. Their constitutionality depends upon whether they are reasonably adapted to a permissible legislative objective. The issue is one of substantive due process.

B. THE STATUTE IS A REASONABLE EXERCISE OF CONGRESSIONAL POWER

1. Section 349(a)(3) stems from the power to deal with foreign affairs and the powers inherent in national sovereignty. In our view, either of these branches of legislative authority is sufficient to support the statute.

Perez v. *Brownell*, 356 U.S. 44, upheld a statutory provision for expatriation through voting in a foreign political election. In doing so, it found "a rational nexus" (356 U.S. at 58) between the expatriation edict and the foreign affairs power. The nub of the court's

[32] *Kent* v. *Dulles*, 357 U.S. 116; *Worthy* v. *Herter*, 270 F. 2d 905 (C.A.D.C.), certiorari denied, 361 U.S. 918; *Frank* v. *Herter*, 269 F. 2d 245 (C.A.D.C.), certiorari denied, 361 U.S. 918; *Porter* v. *Herter*, 278 F. 2d 280 (C.A.D.C.), certiorari denied, 364 U.S. 837.

[33] *E.g.*, Zoning and anti-discrimination statutes. See also *Rex Trailer Co., Inc.* v. *United States*, 350 U.S. 148 (liquidated damages for fraud on government); *U.S. ex rel. Marcus* v. *Hess*, 317 U.S. 537 (same).

[34] See *Sacher* v. *Association of the Bar*, 347 U.S. 388 (disbarment); *Hawker* v. *New York*, 170 U.S. 189 (refusal of license as doctor because of criminal conviction years before statute was passed); *Garner* v. *Board of Public Works*, 341 U.S. 716 (refusal of public employment for prior subversive activity); *De Veau* v. *Braisted*, 363 U.S. 144 (exclusion from union office of convicted felon).

holding appears in the following excerpt from Mr. Justice Frankfurter's majority opinion, 356 U.S. 60–61:

> The importance and extreme delicacy of the matters here sought to be regulated demand that Congress be permitted ample scope in selecting appropriate modes for accomplishing its purpose. The critical connection between this conduct and loss of citizenship is the fact that it is the possession of American citizenship by a person committing the act that makes the act potentially embarrassing to the American Government and pregnant with the possibility of embroiling this country in disputes with other nations. The termination of citizenship terminates the problem. Moreover, the fact is not without significance that Congress has interpreted this conduct, not irrationally, as importing not only something less than complete and unswerving allegiance to the United States but also elements of an allegiance to another country in some measure, at least, inconsistent with American citizenship.

See also Mr. Justice Brennan's explanation of the *Perez* holding in his concurring opinion in *Trop* v. *Dulles*, 356 U.S. 86, 105–107.

The rationale in *Perez*, as expressed in the above quotation, has two facets: (1) this measure was needed to avoid embarrassments and embroilments in our relations with foreign governments; (2) it was not unreasonable for Congress to interpret voting in a foreign election as inconsistent with allegiance to the United States and as denoting allegiance to another country. We submit that both of those considerations

are present here and surely no less forcibly than in *Perez*.

The danger of embroilment and embarrassment from voting in a foreign election is real enough, but it is hardly equal to the risks engendered by service in a foreign army. Military service is a more positive and active identification with the foreign government than voting. Such armed participation by our citizens in the military affairs of other nations may infringe national policies of neutrality; it may defy national policies which support or oppose particular nations; it may lead us in directions and into controversies embarrassing, and even hazardous, to our government and its citizens. See *Talbot* v. *Jansen*, 3 Dall. 133, 155. As stated in *Perez*, 356 U.S. at 59:

> Experience amply attests that, in this day of extensive international travel, rapid communication and widespread use of propaganda, the activities of the citizens of one nation when in another country can easily cause serious embarrassments to the government of their own country as well as to their fellow citizens. We cannot deny to Congress the reasonable belief that these difficulties might well become acute, to the point of jeopardizing the successful conduct of international relations, when a citizen of one country chooses to participate in the political or governmental affairs of another country. The citizen may by his action unwittingly promote or encourage a course

> of conduct contrary to the interests of his own government; moreover, the people or government of the foreign country may regard his action to be the action of his government, or at least as a reflection if not an expression of its policy.

The second consideration stressed in *Perez*—impaired allegiance to this country—is equally manifest here. Military service in this country, as in other countries, is one of the most "imperative obligations of citizenship." *Kennedy* v. *Mendoza-Martinez,* 372 U.S. 144, 159; *Selective Draft Law Cases,* 245 U.S. 366, 378. A person who serves in the armed forces of a foreign state has evinced a support of that country's aims and an obedience to its authority which are ordinarily quite inconsistent with his continued allegiance to the United States. Thus such service not only is precisely the type of conduct that can be dealt with by Congress in the exercise of its foreign affairs power under the majority concept in *Perez;* it also appears to be within the formulation of the Chief Justice's dissenting opinion in that case, 356 U.S. at 68:

> citizenship may not only be voluntarily renounced through exercise of the right of expatriation but also by other actions in derogation of undivided allegiance to this country.

It seems clear, therefore, that this statute represents a reasonable effort to deal with the twin problems of potential embroilments and impaired

allegiance. See *The Expatriation Act of 1954*, 64 Yale L. J. 1164, 1174. Moreover, Congressional awareness of those problems does not depend on conjecture. It emerges with clarity from the legislative background.

2. Statutory definition of grounds for expatriation was inaugurated by the Act of March 2, 1907, 34 Stat. 1228, was codified and extended in Sections 401–409 of the Nationality Act of 1940, 54 Stat. 1168–1170, and was further codified in Sections 349–356 of the Immigration and Nationality Act of 1952, 66 Stat. 267–272, 8 U.S.C. 1481–1488. The general history of this legislative development was extensively reviewed in *Perez*, 356 U.S. at 48–58. Here, we shall stress only the portions of the legislative history which bear directly on the immediate problem.

Military service by American nationals who have volunteered or have been conscripted in foreign armies has been a matter of deep concern to our Nation, from its inception. See 3 Moore, *International Law Digest*, Secs. 434–440; 3 Hackworth, *Digest of International Law*, pp. 166–207; Borchard, *Diplomatic Protection of Citizens Aboard*, 766 *et seq.*, 543 *et seq.*, 814; Tsiang, *The Question of Expatriation in America Prior to 1907*, pp. 45–55, 78–84; *Talbot* v. *Jansen*, 3 Dall. 133, 155. Indeed, the impressment of American nationals was a principal cause of the War of 1812. Moore, *supra*, Sec. 434.

This history and experience unquestionably influenced Congress in enacting the provisions relative to expatriation in the 1907, 1940, and 1952 statutes. As shown in *Perez*, 356 U.S. at 50–51, the sponsors of the 1907 Act, whose views were substantially adopted by

Congress, emphasized their concern with actions of American citizens which caused "increasing embarrassment" in our foreign relations and which were inconsistent with continued allegiance to this country.

The background of the 1940 Act is even more revealing. As we have noted (p. 44, *supra*), the Cabinet Committee observed that the proposed expatriation provisions

> are merely intended to deprive persons of American nationality when such persons, by their own acts, or inaction, show that their real attachment is to the foreign country and not to the United States.

Codification of the Nationality Laws of the United States, 76th Cong., 1st Sess., Part 1, p. VII. The same committee also stated, in commenting on the proposed new provision for foreign military service (*id.*, at p. 67), that an American national who

> voluntarily enters, or continues to serve in, the army of a foreign state, thus offering his all in support of such state, should be deemed to have transferred his allegiance to it.

The point was elaborated by Richard W. Flournoy, one of those chiefly responsible for the new expatriation proposals:

> In very recent years Americans have entered the armies of foreign states. For instance, in the Spanish war and in the present war a good many are going into the armies of foreign states, and it does not seem reasonable that a person should give himself up and risk his life for the good of a foreign state and remain a citizen of the United States, although it may be

reasonable to provide for recovering the citizenship readily in such cases.

Hearings on H.R. 6127, superseded by H.R. 9980, 76th Cong., 1st Sess., p. 131. Mr. Flournoy's testimony referred to "the World War" and "the present war," which indicated, respectively, World War I and World War II. Before American involvement in those conflicts, many Americans had volunteered for service in the contending armies, primarily on the Allied side.[35] Mr. Flournoy's reference to "the Span-

[35] Section 323 of the Nationality Act of 1940, 54 Stat. 1149, codifying a 1918 enactment, afforded an expeditious process for resumption of American citizenship by persons who had lost such citizenship through military service, coupled with an oath of allegiance, in Allied Armies during World War I. Section 323 was amended by the Act of April 2, 1942, 56 Stat. 198, to extend its benefits to persons who had lost citizenship through service in Allied Armies in World War II. It was reenacted, with some modifications, in Section 327 of the Immigration and Nationality Act, 8 U.S.C. 1438. See *Reaume* v. *United States*, 124 F. Supp. 851 (E.D. Mich.); *Matter of P—*, 4 I & N Dec. 248. In addition, Section 101(a)(27)(D), 8 U.S.C. 1101 (a)(27)(D) grants nonquota status to such a person who seeks to return to the United States to regain his citizenship under Section 327. The World War II legislation appears to have been motivated by a desire to restore the citizenship of Americans who had joined allied armies, so that they could serve in the armed forces of the United States. See H. Rep. 1904, S. Rep. 1166, 77th Cong., 2d Sess.

Section 317(c) of the Nationality Act of 1940, 54 Stat. 1147, conferred similar naturalization and nonquota benefits upon any person who had lost his citizenship under Section 401(c), through service in foreign armed forces. See *Di Iorio* v. *Nicolls*, 182 F. 2d 836 (C.A. 1). However, this provision was not continued in the 1952 codification, and the reason for its elimination is not revealed in the legislative deliberations. At present, therefore, a person who lost citizenship through foreign military service, other than in allied armies during World War I or II, does not get any special naturalization or immigration

ish war" denoted the recently concluded Civil War in Spain, in which many Americans had participated. The plain implication of his remarks, in the light of the previous statutory history, was that these and other instances of service by American citizens in foreign armies was an actual or potential source of embarrassment to the foreign relations of the United States.

We have previously noted (pp. 39–41, *supra*) that the Cabinet Committee's proposal relating to expatriation through unsanctioned military service was modified by Congress in the 1940 Act by restricting it to dual nationals, and that the 1952 Act restored this provision substantially to the form proposed by the Cabinet Committee. This revision is explained in the following statement in the Senate Judiciary Committee study which preceded the 1952 Act, S. Rep. 1515, 81st Cong., 2d Sess., p. 749:

> The subcommittee feels that the provisions covering loss of nationality through service in the armed forces of a foreign country should be uniform and should not be dependent upon foreign law, and therefore is recommending changes in this subsection designed to effect such uniformity.

While the Committee did not refer directly to the motivation made explicit in the legislative history of

benefits. However, as we have noted (p. 48, *supra*), petitioner is entitled to nonquota status, and he eventually would be eligible to apply for naturalization if he succeeds in achieving lawful residence.

the 1940 and 1907 Acts,[36] the 1952 recodification must be read, of course, in the light of that history, particularly since it reverted substantially to the pattern proposed by the Cabinet Committee which drafted the 1940 Nationality Code. That the Committee viewed foreign military service and the conduct of foreign affairs as intimately related is underscored by the new statutory directive in Section 349(a)(3) that foreign military service would expatriate unless it was "specifically authorized in writing by the Secretary of State and the Secretary of Defense".[37]

3. The only remaining question is whether the means chosen to effectuate the Congressional policy are reasonable. In this respect, also, we believe the issue is directly resolved by *Perez* v. *Brownell*. The Court's opinion points out, 356 U.S. at 60, that the possession of American citizenship by the person who participates in the political affairs of a foreign nation is

[36] No further elaboration is found in the final Committee reports on the 1952 Act. S. Rep. 1137, p. 46, H. Rep. 1365, p. 83, 82d Cong., 2d Sess.

[37] During the legislative hearings the legislative committees considered and evidently rejected proposals to enhance the flexibility of this provision by providing alternatively for general authorization of military service by law, to permit approval either by the Secretary of State or the Secretary of Defense, to permit approval of such service to be given after it was undertaken, and to exempt service in the armed forces of nations which later became allied with this country. See Joint Hearings before the Subcommittees of the Committees on the Judiciary, 82d Cong., 1st Sess., on S. 716, H.R. 2379, and H.R. 2816, pp. 101, 85, 96. The expressions in these hearings, particularly at page 101 *supra*, indicated a keen awareness of the foreign policy implications of this measure.

> potentially embarrassing to the American Government and pregnant with the possibility of embroiling this country in disputes with other nations. *The termination of citizenship terminates the problem.* [Emphasis added.]

In similar vein, Mr. Justice Brennan pointed out in his concurring opinion in *Trop* v. *Dulles*, 356 U.S. at 106–107:

> Congress might reasonably believe that in these circumstances there is no acceptable alternative to expatriation as a means of avoiding possible embarrassments to our relations with foreign nations. And where Congress has determined that considerations of the highest national importance indicate a course of action for which an adequate substitute might rationally appear lacking, I cannot say that this means lies beyond Congress's power to choose.

Patently, these considerations apply with at least equal force to the conduct involved here. The service by an American citizen in the armed forces of a foreign state provokes a situation "pregnant with the possibility of embroiling this country in disputes with other nations." Such conduct takes place on foreign soil and it is the American citizenship of the person committing the act which creates the potential danger. "The termination of citizenship terminates the problem." And Congress could reasonably conclude that there is "no acceptable alternative to expatriation" in such cases. That device is "a uniquely potent corrective" for actions which "could dangerously prejudice our diplomacy". *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 187 (Brennan, J., con-

curring).[38] Without it, the United States would lack effective means to cope with a citizen who participates in foreign military ventures inherently embarrassing to our nation and perilous to its people.[39]

Petitioner argues that Section 349(a)(3) "is not confined to 'embarrassing' service in the military of an enemy or unfriendly nation", but would also reach "nonembarrassing" service in the army of an ally. (Pet. Br. 24). But certainly Congress may adopt reasonable classifications or categories in dealing with a general problem. As stated in *Perez*, in implementing its power over foreign affairs, Congress must be free to legislate "on more than an *ad hoc* basis" (356 U.S. at 59–60).

It is possible, to be sure, that in some instances foreign military service by a citizen may not be embarrassing to the United States. But the individual citizen cannot be permitted to make this judgment.

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[38] The alternatives mentioned in *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 184–185, obviously are not relevant here, since they were suggested in relation to the imposition of punishment on a draft evader. The court did not hold that expatriation could not be imposed as a nonpunitive, regulatory measure, implementing the foreign affairs power. And it did not question the conclusion announced in *Perez*, that expatriation was a rational device for dealing with the problem of a citizen who engages in political activity in a foreign country.

[39] Many other nations provide for loss of nationality by their nationals who serve in the armed forces of foreign states. These include Afghanistan, Argentina, Australia, Austria, Brazil, Cuba, Germany, Guatemala, Hungary, Indonesia, Iraq, Italy, Jordan, Panama, Portugal, and Turkey. See United Nations Legislative Series, St / Leg / Ser. B/4, *Laws Concerning Nationality*, pp. 3, 12, 19, 36, 56, 109, 183, 200, 222, 233, 243, 268, 275, 371, 392, 461. A number of these laws resemble Section 349(a)(3), *e.g.*, those of Austria, Cuba, Germany, Indonesia, Iraq, Italy, Jordan, and Turkey.

Indeed, the very examples petitioner gives (Pet. Br. 37) of military service by individual Americans to advance objectives they deem desirable illustrate quite graphically the hazards to our nation's foreign policy aroused by such unsanctioned participation. Nor is it advisable to allow the matter to be controlled by a foreign government, as the Senate Judiciary Committee's 1950 report indicates. Instead, the statute properly reposes the responsibility for assessing the interests of the United States in the foreign affairs agencies of our government, by prescribing expatriation "unless, prior to such entry or service, such entry or service is specifically authorized in writing by the Secretary of State and the Secretary of Defense".

We submit that the means chosen by Congress to achieve its purpose were constitutionally permissible and well within the broad range of discretion guaranteed the Legislative Branch.

IV

THERE WAS NO DENIAL OF PROCEDURAL DUE PROCESS

We have already considered petitioner's assertion that the statute visits punishment without procedural safeguards. At this point we shall discuss his other procedural objections.

A. EXPATRIATION OCCURRED WHEN THE MILITARY SERVICE WAS PERFORMED AND DID NOT DEPEND ON ANY ANTECEDENT JUDICIAL OR ADMINISTRATIVE DETERMINATION

1. Petitioner contends (Pet. Br. 70) that there can be no loss of citizenship until there has been a judicial determination of alienage. This view was

adopted by the district court but rejected by the court of appeals which held that loss of nationality occurred "immediately upon commission of the expatriating acts", and that this consequence was not constitutionally prohibited. We believe that the court of appeals was clearly correct.

The mandate of the statute that there be an automatic loss of citizenship upon performance of an expatriating act hardly could be more explicit. The introductory clause of Section 349(a) declares that a person who commits the specified acts "shall lose his nationality". The only mention in Section 349 of proceedings antecedent to such loss is in paragraphs (7)—requiring approval by the Attorney General for a renunciation of citizenship during war; (8)—making conviction by a court martial or court prerequisite to loss of citizenship by military deserters[10]; and (9)—making similar convictions prerequisite to loss of citizenship for treasonous acts. Denaturalization of a naturalized citizen is another instance in which the statute requires a judicial determination before loss of citizenship can occur. See Section 340, Immigration and Nationality Act, 8 U.S.C. 1451. The absence of such a prescription in Section 349(a)(3) indicates that none was intended. Moreover the legislative purpose is made even more explicit in Section 356 of the Immigration and Nationality Act, 8 U.S.C. 1488, which specifies that:

> The loss of nationality under this chapter shall result solely from the performance by

[10] This provision was found unconstitutional in *Trop* v. *Dulles*, 356 U.S. 86.

national of the acts or fulfillment of the conditions specified in this chapter.

The aim of this section to make loss of nationality automatic is underlined in the report of the Cabinet Committee on the 1940 Act. *Codification of the Nationality Laws of the United States,* House Committee Print, 76th Cong., 1st Sess., Part 1, p. 78. Cumulative evidence is found in the provisions granting special immigration and naturalization benefits to certain classes of expatriates. See Secs. 101(a)(27)(D), 324 and 327, Immigration and Nationality Act, 8 U.S.C. 1101(a)(27)(D), 1435 and 1438 and note 35, *supra,* p. 56.

We note also the provision for a certificate of loss of nationality by State Department officials who believe a person in a foreign state "has lost his United States nationality". Section 358, Immigration and Nationality Act, 8 U.S.C. 1501; 22 CFR 50.14–50.19. Such a certificate was served on petitioner in Cuba. (R. 254a, 296b). It is evident, both from the language of this statute and its legislative history, that such certificates were designed only to recognize a previous occurrence. See *Codification of the Nationality Laws of the United States,* House Committee Print, 76th Cong., 1st Sess., Part 1, pp. 80, 78, VI.

The language and structure of Section 349(a)(3) thus compel the conclusion that under its terms loss of citizenship occurs immediately when foreign military service is performed. This reading is abundantly confirmed in the legislative history. See *Codification of the Nationality Laws of the United States,* House Committee Print, 76th Cong., 1st Sess., Part 1, pp. VII, 67, 78; S. Rep. 1515, 81st Cong., 2d Sess., pp.

747, 749; S. Rep. 1137, p. 46; H. Rep. 1365, p. 83, 82d Cong., 2d Sess.

2. Since the design of the statute is plain, petitioner's position must rest on an asserted lack of power. But this, too, is without substance. Since Section 349(a)(3) does not inflict punishment, petitioner can point to no specific constitutional command which requires a judicial declaration before the statute can operate. Cf. *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144.

Nor is there any question of due process. Every decision of this Court since the early days of the Republic has found or assumed that loss of citizenship was the immediate consequence of certain actions, and that the courts were called on to determine only whether that event had occurred. The earliest cases, decided long before there were any statutory definitions of expatriation, dealt with property rights. The courts determined in each instance that an "act of expatriation" had not occurred and that citizenship had not been lost. *Talbot* v. *Jansen*, 3 Dall. 133, 162–166, 169; *The Charming Betsy*, 2 Cranch 64, 120; *The Santissima Trinidad*, 7 Wheat. 283, 346–347, *Inglis* v. *Sailor's Snug Harbour*, 3 Peters 99; *Shanks* v. *Dupont*, 3 Peters 242, 246. The modern decisions commenced with *Mackenzie* v. *Hare*, 239 U.S. 299, which refused to disturb the finding of election officials that the act of marriage had caused expatriation. *Perkins* v. *Elg*, 307 U.S. 325, 329, 334 considered the Secretary of State's refusal of a passport, recognized that expatriation would have resulted spontaneously from voluntary action of the citizen, but

ruled that there had been no such voluntary action. Similar conclusions were expressed in *Mandoli* v. *Acheson*, 344 U.S. 133, 136 and *Kawakita* v. *United States*, 343 U.S. 717, 734. *Savorgnan* v. *United States*, 338 U.S. 491, 499, 500, 506 found that earlier overt acts had caused expatriation. This also was the finding in *Perez* v. *Brownell*, 356 U.S. 44, 60–61 which declared that the automatic operation of expatriation was its major value in implementing the foreign affairs function. The expressions of a majority of this court in *Trop* v. *Dulles*, 356 U.S. 86, 92, 106, 126 likewise acknowledged the automatic nature of expatriation. And this Court's latest holding in *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 164 was premised squarely on a finding that the expatriation statutes "automatically—without prior court or administrative proceedings—impose forfeiture of citizenship". The majority concluded that the statute there under consideration entailed punishment, and held that such automatic loss of citizenship could not be imposed since the statute had not observed the procedural protections prescribed for a criminal trial. Since Section 349(a)(3) is not punitive, there are no such inhibitions here.

Thus the supposition that expatriation must await a judicial pronouncement is repudiated by every relevant decision of this Court. Citizenship, except through naturalization, is conferred automatically and it does not seem unreasonable for Congress to declare that loss of citizenship, when this consequence is appropriate, likewise shall result from certain overt actions. Moreover, we believe that the acceptance of petitioner's theory would go far to nullify the expatri-

ation statutes. In the first place, we are not aware of any judicial proceeding the United States could bring to establish that loss of nationality has occurred, particularly against a defendant who is outside the United States. Petitioner apparently supposes that expatriation should await the bringing of an action by the alleged citizen to determine his status. We doubt that many such actions would be brought. More important, petitioner's theory would prevent our government from adopting effective measures to deal with a citizen, including one who has renounced his American citizenship, who continues, in a foreign land, to engage in conduct perilous to our nation and repugnant to his obligations of citizenship. Since a judicial deprivation of citizenship would be impracticable or impossible, such a person would be able to retain the mantle of American citizenship while causing continuing embarrassments and dangers to the United States.

Our position does not, of course, shut off access to the courts, since a person claiming to be a citizen has many methods of establishing his title. If abroad, he can obtain a certificate of identity from the Secretary of State so that he can come to this country to press his claim. Section 360 (b) and (c), Immigration and Nationality Act, 8 U.S.C. 1503 (b) and (c). He can also bring suit in a court in this country for a judgment declaring him to be a citizen of the United States. Section 360(a), Immigration and Nationality Act, 8 U.S.C. 1503(a). Such a declaratory judgment suit could have been brought even while the petitioner was in Cuba. *Rusk* v. *Cort*, 369 U.S. 367. And in

challenging the deportation order petitioner was entitled to, and received, *de novo* judicial consideration of his citizenship status. *Ng Fung Ho* v. *White*, 259 U.S. 276. Moreover, in such judicial proceedings the burden was on the government to establish petitioner's loss of citizenship by clear, unequivocal, and convincing evidence. *Gonzales* v. *Landon*, 350 U.S. 920; *Nishikawa* v. *Dulles*, 356 U.S. 129. He would have been entitled to similar *de novo* judicial inquiry if he had sought declaratory review[41] of the deportation order, *Frank* v. *Rogers*, 253 F. 2d 889 (C.A.D.C.), or challenged it by petition for review by the court of appeals. Section 106(a) (5), Immigration and Nationality Act, as amended, 8 U.S.C. 1105a(a)(5).

These are formidable procedural protections. They assure to petitioner the full measure of judicial inquiry requisite to due process.[42]

B. THE ABSENCE OF A PRIOR JUDICIAL DETERMINATION DOES NOT INVALIDATE A DEPORTATION ORDER BASED UPON AN ADMINISTRATIVE DETERMINATION OF CITIZENSHIP WHICH WAS SUBJECT TO SUBSEQUENT DE NOVO REVIEW

In the course of the deportation hearing plaintiff claimed citizenship. The administrative authorities determined the issue. The district court subsequently made its own *de novo* determination upon review. Petitioner now argues that the deportation order

[41] This remedy has now been supplanted by the petition for review by the court of appeals. See *Foti* v. *INS*, 375 U.S. 217.

[42] In emphasizing its wish to make expatriation automatic the Cabinet Committee which drafted the 1940 Act pointed to the availability of such judicial review. *Codification of the Nationality Laws of the United States*, House Committee Print, 76th Cong., 1st Sess., Part. 1, p. 78.

should be set aside on the ground that the administrative authorities could not proceed with the deportation hearing until after his claim of citizenship had been judicially determined. There are two answers. First, the administrative authorities have jurisdiction to inquire into citizenship when drawn in issue in a deportation proceeding. Second, there was no prejudice in any event, because the petitioner's lack of United States citizenship has now been determined *de novo* by the courts.

We agree that the question whether petitioner lost his citizenship by voluntary service in the armed forces of Cuba is a fit subject for judicial determination. Petitioner could have raised the issue in various ways, including an application for a declaratory judgment. See *supra*, pp. 66–67. We also agree that no administrative ruling would bar an independent *de novo* judicial determination upon review. But those premises will not sustain the conclusion that the Attorney General has no authority to rule upon the issue when it is material to a proceeding within his jurisdiction. The power of the courts to make an independent adjudication when their jurisdiction is properly invoked does not exclude administrative action in this area.

The proposition that the Attorney General may determine issues of citizenship has long been settled. *United States* v. *Sing Tuck*, 194 U.S. 161. Alienage is a jurisdictional element in a deportation charge, and a deportation order cannot stand unless the government proves that the person charged is an alien. *United States ex rel. Bilokumsky* v. *Tod*, 263 U.S. 149,

153. But it does not follow that whenever a person urges a "plausible" claim to citizenship (Pet. Br., p. 41), the administrative proceeding must halt. On the contrary, it is necessary for the Attorney General to determine his jurisdiction—since he can deport only aliens—in order to conclude the proceeding and arrive at a decision. Sometimes, this entails passing on claims to United States citizenship, and not infrequently the administrative decision upholds that claim. See, *e.g.*, *Matter of Z—*, 9 I & N Dec. 329; *Matter of P—*, 9 I & N Dec. 362; *Matter of H—*, 9 I & N Dec. 411; *Matter of S—*, 8 I & N Dec. 226; *Matter of C.*, 8 I & N Dec. 511; *Matter of S—*, 8 I & N Dec. 340; *Matter of G—*, 4 I & N Dec. 57; *Matter of Z—*, 2 I & N Dec. 346.[43] The courts are not called upon to consider the many cases (of which the above are only a sampling) in which the administrative ruling is favorable. One claiming citizenship unquestionably has a right to a judicial determination but only when and if the administrative ruling goes against him. And the Attorney General's authority to rule on citizenship claims, and thus to make a preliminary appraisal of his jurisdiction, exists whether the issue relates to the acquisition of citizenship or its loss.

Petitioner's assumption that the Attorney General is not empowered to adjudicate citizenship status is decisively opposed by a host of authorities. The leading case is *United States* v. *Sing Tuck*, 194 U.S. 161. Rejecting a contention that immigration officers could not adjudicate the citizenship status of entry appli-

[43] The latter three decisions found citizenship had not been lost through alleged foreign military service.

cants who claimed to be native United States citizens, Mr. Justice Holmes stated, 194 U.S. at 167, 168, 170, that the statute:

> points out a mode of procedure which must be followed before there can be a resort to the courts. In order to act at all the executive officer must decide upon the question of citizenship. If his jurisdiction is subject to being upset, still it is necessary that he should proceed if he decides that it exists * * *. [I]t is one of the necessities of the administration of justice that even fundamental questions should be determined in an orderly way * * *. [B]efore the courts can be called upon, the preliminary sifting process provided by the statutes must be gone through with.

The authority to adjudicate citizenship claims in passing on applications for admission to the United States was also sustained in *United States* v. *Ju Toy*, 198 U.S. 253, 262; *Chin Yow* v. *United States*, 208 U.S. 8, 12; and *Tang Tun* v. *Edsell*, 223 U.S. 673, 675. For more recent lower court expressions, see *United States ex rel. Lapides* v. *Watkins*, 165 F. 2d 1017, 1018 (C.A. 2); *Lee Fong Fook* v. *Wixon*, 170 F. 2d 245, 246 (C.A. 9), certiorari denied, 336 U.S. 914; *Pan American World Airways* v. *United States*, 122 F. Supp. 682, 685–686 (Ct. Cl.).[44]

[44] Petitioner's quotation from *United States* v. *Minker*, 350 U.S. 179, 188 (Pet. Br. 41) is taken out of context and misapplied. *Minker* involved only the validity of subpena against a naturalized citizen. Mr. Justice Frankfurter obviously did not deny the power of the Attorney General to rule on citizenship issues, subject to *de novo* inquiry in the courts when the citizenship claim was rejected.

Petitioner is mistaken in his belief that *Ng Fung Ho* v. *White*, 259 U.S. 276, precludes the consideration of his citizenship claim by immigration officers. *Ng Fung Ho* did qualify the holding of *Ju Toy, supra*, when it concluded that upon judicial review of a deportation order the court would conduct *de novo* scrutiny of a non-frivolous citizenship claim which had been presented in the administrative proceedings. But it did not disturb the *Sing Tuck* pronouncement that the executive officers must be permitted to rule on their jurisdiction and that "even fundamental questions must be decided in an orderly way". Indeed, Mr. Justice Brandeis cited *Sing Tuck* in declaring that "The proceeding is obviously not void *ab initio*". 259 U.S. at 282. And in remanding the case for *de novo* hearing on the citizenship issue the court refused to direct that the petitioners should be discharged from custody under the deportation order. 259 U.S. at 285.

Other deportation cases in which the courts have approved the consideration of citizenship claims in a deportation proceeding include *Chin Bak Kan* v. *United States*, 186 U.S. 193, 200; *Ah How* v. *United States*, 193 U.S. 65; *Florentine* v. *Landon*, 231 F. 2d 452 (C.A. 9); *Hernandez-Avila* v. *Boyd*, 294 F. 2d 373, 376 (C.A. 9); *In re Wing*, 124 F. Supp. 492, 494 (N.D. Cal.). Moreover, *Perez* v. *Brownell*, 365 U.S. 44, furnishes additional confirmation since the citizenship claim there was fully adjudicated in a deportation proceeding before the declaratory judgment suit was brought. No member of the Court questioned the authority to conduct the deportation proceeding to

its conclusion. Cf. dissenting opinion of the Chief Justice, 356 U.S. at 65, note 6. The Court's apparent assumption in *Perez* is in line with the cases holding that the declaratory judgment suit can be brought only after final administrative action. *Ling Share Yee* v. *Acheson*, 214 F. 2d 4 (C.A. 3); *Lew Hsiang* v. *Brownell*, 234 F. 2d 232 (C.A. 7); *Ferretti* v. *Dulles*, 246 F. 2d 544 (C.A. 2). Added corroboration is found in the new statute for judicial review of final deportation orders (see *Foti* v. *INS*, 375 U.S. 217), which recognizes a right to *de novo* judicial inquiry of citizenship claims in reviewing the final deportation order and supersedes the declaratory judgment remedy in such cases. Section 106(a)(5), Immigration and Nationality Act, as amended, 8 U.S.C. 1105a(a)(5).[35]

Petitioner's reliance (Pet. Br. 41) on *Kessler* v. *Strecker*, 307 U.S. 22, and *United States ex rel. Bilokumsky* v. *Tod*, 263 U.S. 149, is misplaced. *Kessler* merely found that the lower court had erroneously ordered a *de novo* judicial hearing in reviewing a deportation order, since no citizenship issue was presented. It pointed out that the deportation proceeding was administrative and that a *de novo* judicial hearing in a habeas corpus review of the deportation order would have been warranted only on a citizenship claim when "an alleged alien asserts his United States citizenship in the hearing before the Depart-

[35] *Wong Wing Foo* v. *McGrath*, 196 F. 2d 120 (C.A. 9), cited by petitioner (Pet. Br. 41) merely held that in a suit for declaratory judgment of citizenship, the Court's consideration was *de novo*. This holding was indubitably correct. *Perez* v. *Brownell*, 356 U.S. 44, 47, note 2.

ment, and supports his claim by substantial evidence". *Sing Tuck* was cited in support of this statement. 307 U.S. at 34–35. *Bilokumsky* similarly did not involve a citizenship claim. The question was whether the government had sustained its burden of proving the alienage of a respondent who stood mute. The quotation recited by petitioner merely cited *Ng Fung Ho* in stating that if citizenship status had been supported by substantial evidence in the deportation proceedings it would thereafter have been "finally determined" by a judicial tribunal. Moreover, in a subsequent passage the Court recognized the authority of immigration officers to rule on citizenship claims in deportation proceedings, citing *Sing Tuck* and stating, 263 U.S. at 153: "It is true that alienage is a jurisdictional fact; and that an order of deportation must be predicated upon a finding of that fact".

Consequently, we believe it firmly established that the Attorney General has authority to rule on the citizenship claim in determining whether he had jurisdiction to direct deportation, and that petitioner's undoubted right to a judicial review of the issues decided in that proceeding matured only when there was a final adverse ruling.

Finally, we cannot in any event see any point to petitioner's attack on the administrative proceeding at this time. Although we do not believe such a challenge has any substance, it would have relevance only while that proceeding was pending. The administrative determination has long since been made, and even if petitioner's position were correct it would entitle him only to a *de novo* judicial hearing, which

is exactly what he has received. Petitioner did question the administrative process at its outset but his challenge was rejected by the district court. 198 F. Supp. 40. He did not appeal the district court's rejection, but went through the administrative proceeding to its completion. Since he is now receiving the judicial consideration he asked for, the contention has, at most, an academic significance.

C. THE CONTENTIONS BASED ON ALLEGED IRREGULARITIES IN THE ARREST AND DETENTION ARE INSUBSTANTIAL.

Petitioner's account of the circumstances of his arrest is inaccurate. The record shows that he was interrogated by immigration officers at his home on the evening of January 25, 1961 and voluntarily went to the immigration office where the interrogation was continued for several hours (R. 59a *et seq.*, 236a, 241a, 9b *et seq.*). Throughout the interrogation he was accompanied by his friend, Jean Secon, who advised him not to talk without a lawyer. (R. 3b–6b, 22b). He did not accept her advice and continued to answer questions, saying he did not need an attorney (R. 31b). It is clear that Marks was not under arrest during this questioning and was placed under arrest only on the morning of January 26, 1961, after he had completed his statement (R. 28b–29b, 37b). This arrest was made without warrant, under the authority of Section 287(a)(2) of the Immigration and Nationality Act, 8 U.S.C. 1357(a)(2), on the ground that petitioner appeared to be a deportable alien who was likely to escape before a warrant could be obtained. An order to show cause in deportation

proceedings was issued and served the same day, shortly after the arrest. That same day, he also was served with a warrant of arrest in the deportation proceedings and his detention was ordered pending determination of his deportability (R. 67a). The authority for such arrest and detention pending determination of deportability is found in Section 242(a) of the Immigration and Nationality Act, 8 U.S.C. 1252(a). The basis for the arrest and detention was a determination, based on solid evidence, that if released he would be likely to abscond. (R. 23a–24a, 29a).

Petitioner contends that his arrest and detention could be authorized only by a judicial officer, even though the proceeding is entirely administrative. This contention is not supported by any authority, and indeed conflicts with uniform legislative policy and administrative practice and with the consistent holdings of this Court for 75 years. We do not agree that the constitutionality of administrative arrests in deportation proceedings was left open in *Abel* v. *United States*, 362 U.S. 217. *Abel* was a criminal prosecution in which a prime issue was whether evidence had lawfully been obtained in a search incidental to an immigration arrest. There could have been no proper search if the arrest was unlawful. While the Court noted that this issue had not been raised in the lower court, we hardly think such an omission would have persuaded the Court to countenance a denial of fundamental rights. See *Rosenberg* v. *Fleuti*, 374 U.S. 449. In fact, Mr. Justice Frankfurter's prevailing opinion in *Abel* carefully exam-

ined the arresting authority of immigration officers, pointed out that it had been sanctioned by statute since the earliest days of the Republic and had been accepted without question by numerous decisions of this Court, and found no basis for invalidating the arrest and concomitant search in "the presence of this impressive historical evidence of acceptance of the validity of statutes providing for administrative deportation arrest from almost the beginning of the Nation". 362 U.S. at 230–234. The recent case of *United States* v. *Martinez Alvarado*, 321 F. 2d 363 (C.A. 2), followed *abel* in upholding a search after an immigration arrest without warrant. Other holdings which have directly endorsed the administrative power to arrest and detain persons against whom deportation proceedings are brought include *Wong Wing* v. *United States*, 163 U.S. 228, 235, and *Carlson* v. *Landon*, 342 U.S. 524.

Petitioner complains that there is no specific requirement for probable cause in the statute or regulations. But such a specification is unnecessary since an arrest without probable cause would be arbitrary and could be challenged immediately by habeas corpus. See *Carlson* v. *Landon*, *supra*. Petitioner did launch a challenge and the district court ruled against him. 198 F. Supp. 40, 45. We believe the district court was right, since there clearly was probable cause for believing him an alien subject to deportation. Petitioner could have appealed the ruling, but he did not choose to do so.

Petitioner next argues that the administrative authorities were powerless to arrest and detain him because he claimed to be a citizen of the United

States. This is but a variation of the same theme. While the statute speaks of arresting and detaining "aliens", this language necessarily must include persons believed with probable cause to be aliens. Otherwise the jurisdiction to conduct immigration proceedings could be ousted simply by a claim to United States citizenship. We have demonstrated the error of this theory and shown that immigration officers, in determining their jurisdiction, are empowered to conduct proceedings against persons who claim to be United States citizens and to pass on their citizenship claims. See pp. 68–73, *supra*. Since that is so, there is no basis for abridging their authority by holding them helpless to implement it through arrest, detention or other reasonably appropriate measures. See *Ng Fung Ho* v. *White*, 259 U.S. 276, 285;[46] *Hernandez-Avila* v. *Boyd*, 294 F. 2d 373 (C.A. 9); *Pan American World Airways* v. *United States*, 122 F. Supp. 682, 685–686 (Ct. Cl.); *In re Wing*, 124 F. Supp. 492, 494.

Petitioner also complains about the length of his detention. But the record demonstrates that the Attorney General moved expeditiously and that any delay was caused by petitioner's actions (R. 27a) and by the time inevitably required for hearing, decision, and appeal. As we have noted, the authority to require reasonable detention pending determination of deportability is exercised under Section 242(a) of the

[46] In *Ng Fung Ho* v. *White*, *supra*, the court refused to discharge from custody citizenship claimants held under a deportation order, even though the case was remanded for a *de novo* judicial hearing of their citizenship claims.

Immigration and Nationality Act, 8 U.S.C. 1252(a) and was ratified by *Wong Wing* v. *United States*, 163 U.S. 228, 235, and *Carlson* v. *Landon*, 342 U.S. 524. The terms of the statute itself and an obvious avenue for judicial redress would have enabled him to seek release through habeas corpus if the detention was unreasonably prolonged. As stated above, he did challenge the detention but failed to appeal an adverse decision upholding it.

We have analyzed petitioner's arguments carefully in order to present a complete picture. However, we believe the contentions dealing with the arrest are not relevant to the disposition of the petition in its present posture. The issue no longer is whether petitioner should be detained pending final determination of his status. The matter is now before this Court for final disposition. If petitioner prevails on the merits the detention will end.[47] If he fails, his status as an alien subject to deportation will be ratified and the propriety of his arrest or detention pending the determination of his deportability will have become moot.[48] As Mr. Justice Brandeis observed in *United States ex rel. Bilokumsky* v. *Tod*, 263 U.S. 149, 158,

[47] As we have noted, petitioner has been free on $1000 bail pending final determination of the judicial proceedings.

[48] If the deportation order against him is upheld petitioner would be subject to detention for six months after the final court order, for the purpose of accomplishing the deportation, and to limited supervision thereafter. Section 242(c), Immigration and Nationality Act, 8 U.S.C. 1252(c). Such detention and supervision would depend on different considerations and it is premature, at this stage of the case, to consider the extent to which such measures should be applied against petitioner. See *United States* v. *Witkovich*, 353 U.S. 194.

in rejecting a similar assertion that there was no probable cause for an arrest in deportation proceedings:

> Irregularities on the part of the Government official prior to, or in connection with, the arrest would not necessarily invalidate later proceedings in all respects conformable to law.

Defects in the arrest and detention might of course have a bearing on the admissibility of any evidence resulting from such arrest and detention. *Mallory* v. *United States*, 354 U.S. 449. But the only evidence here which might be subject to such an infirmity would be petitioner's statement to the officers who interrogated and later arrested him (R. 306b). However, as we have noted, both the special inquiry officer and the district court stated that they were excluding this statement from their consideration. R. 363b; 203 F. Supp. at 392. See also page 29, note 11, *supra*. Petitioner's alienage and deportability are abundantly established by other evidence, adduced at the deportation hearing, in the form of documents and oral testimony by petitioner and others.

V

DEPORTATION WAS PROPERLY ORDERED ON SUBSTANTIAL EVIDENCE THAT PETITIONER IS AN ALIEN WHO ENTERED THE UNITED STATES ILLEGALLY

This case originated as a habeas corpus review of a deportation order. In the habeas corpus proceeding, petitioner was entitled to, and received, a *de novo* determination on his claim to United States citizenship. The courts below found that he had lost his United

States citizenship and we have supported that finding in the preceding discussion. If we are correct in our view that petitioner no longer is a citizen of the United States, it becomes necessary, finally, to appraise his assault on the deportation order.

Deportability is premised on Section 241(a)(1) of the Immigration and Nationality Act, 8 U.S.C. 1251 (a)(1), which commands the expulsion of any alien in the United States who—

> at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of such entry.

Proof of deportability must therefore embrace three elements:—alienage, entry, and excludability at the time of such entry. The first presents no problem. A finding that petitioner has lost his citizenship would be conclusive; an alien, by definition, is "any person not a citizen or national of the United States". Section 101(a)(3), Immigration and Nationality Act, 8 U.S.C. 1101(a)(3).

There is no dispute as to the facts underlying petitioner's last entry. He left the United States voluntarily in January, 1959, remained in Cuba, while serving in the Rebel Army of Cuba, until May, 1960 and reentered the United States at El Paso, Texas in July, 1960. Since "any coming of an alien into the United States, from a foreign port or place" is an entry under Section 101(a)(13) of the Immigration and Nationality Act, 8 U.S.C. 1101(a)(13), and since this was not the brief or casual type of absence considered in *Rosenberg* v. *Fleuti*, 374 U.S. 449, peti-

tioner's 1960 return to the United States manifestly was an entry for the purposes of this statute.

There remains the question whether, at the time of his 1960 entry, petitioner was excludable. The order of deportation recited two grounds: (1) that he was excludable because not in possession of an immigrant visa or equivalent document; (2) that he was excludable because of prior conviction for carnal abuse and knowledge, a crime involving turpitude. The court of appeals endorsed deportability on the first ground, and did not reach the second. In our view, deportability on the first charge is clearly established, and we likewise deem it unnecessary to discuss the second, although we believe it too is substantiated.[49]

At the time of his 1960 entry, petitioner sought to remain in this country permanently. Consequently he was an immigrant, under the explicit statutory declaration that an immigrant "means every alien except" specified classes of nonimmigrants, not relevant here. Sec. 101(a)(15) Immigration and Nationality Act, 8 U.S.C. 1101(a)(15).[50] As an im-

[49] The conviction for carnal abuse and knowledge occurred in the United States in 1951, when petitioner concededly was still a citizen of the United States. Petitioner argues that he cannot be deported for an offense committed while he was a citizen. The issue presented by this contention resembles that in *Costello* v. *INS*, No. 83, this Term. However, the ruling in *Costello* does not settle this issue, since this case presents the added feature of excludability for prior crime of an alien who seeks to enter the United States under a statute which bars aliens who "have been convicted" of a crime involving moral turpitude. Section 212(a)(9), Immigration and Nationality Act, 8 U.S.C. 1182(a)(9).

[50] Moreover, under Sec. 214 of the Immigration and Nationality Act, 8 U.S.C. 1184, every alien is presumed to be an im-

migrant he was subject to the injunction of Section 211(a) of the Immigration and Nationality Act, 8 U.S.C. 1181(a) that:

> No immigrant shall be admitted into the United States unless at the time of application for admission he (1) has a valid unexpired immigrant visa * * *.

A similar prohibition against the entry of an immigrant not in possession of an immigrant visa, or an equivalent document, is set forth in Section 212(a)(20) of the Immigration and Nationality Act, 8 U.S.C. 1182(a)(20). Section 211(b), 8 U.S.C. 1181(b), gives the Attorney General discretionary authority to waive this documentary requirement for returning lawful residents, but no such waiver was solicited or granted.

Petitioner concededly entered the United States in 1960 without an immigrant visa or an equivalent document. Since he was then excludable, he is now amenable to deportation.

Petitioner urges that he could not be expected to apply for documents as an immigrant while he claimed to be a citizen. This argument (Pet. Br. 69–70) relies on unsound premises and inappositate authorities. *Matter of W—*, 5 I & N Dec. 759, cited by petitioner, involved an entry by one who was then a naturalized citizen (although subsequently denaturalized) and held that since he was clothed with citizenship status he could not then have been expected to apply for documents as an alien. See, also, *United States ex*

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migrant, unless he has established nonimmigrant status to the satisfaction of an American consular officer overesas.

rel. Brancato v. *Lehmann*, 239 F. 2d 663 (C.A. 6). The situation is quite different here since petitioner previously had lost his American citizenship (as he had been informed) and was an alien at the time of his entry. *Podea* v. *Acheson*, 179 F. 2d 306 (C.A. 2) was a declaratory judgment suit in which the court ruled that military service did not result in expatriation because performed under duress. The court found also that a Rumanian passport had been obtained because the State Department erroneously had refused an American passport. There is no such duress or error here.

Petitioner suggests (Pet. Br. 70) that these holdings are relevant since his expatriation had not been established and he could not have solicited entry documents without conceding his expatriation. The argument is erroneous, for a number of reasons. In the first place, as we have shown (pp. 61, *supra*, *et seq.*), his citizenship had been lost when he performed the act of expatriation. Moreover, there are no overtones of misinformation or misapprehension here, since he was aware of the State Department's view that he had lost his American citizenship, after service of the certificate of loss of nationality in February, 1960.[51] Petitioner made a press statement that he would fight for his American citizenship but did nothing else. It is not true that he had no remedies. He could have asked the State Department to reconsider its action,

[51] As we have noted (pp. 62-63, *supra*) this certificate did not itself cause loss of nationality but merely noted that such loss had occurred. Its function was to notify the party and the interested agencies of our Government that loss of nationality apparently had occurred. It had no binding effect in subsequent consideration of citizenship status.

but did not do so. We have shown (p. 66, *supra*) that he also could have applied to our diplomatic or consular officials then in Cuba for a certificate of identity which would have enabled him to come to the United States to press his citizenship claim,[52] and that he could have sought judicial aid through a declaratory judgment suit in the courts of this country, even though he still continued to reside in Cuba. *Rusk* v. *Cort*, 369 U.S. 367. Moreover, he could have applied for a visa to come to this country. The procurement of such a visa would not have surrendered his citizenship claim, and hardly would have precluded him from urging his citizenship claim in the courts. See, *e.g.*, *Perez* v. *Brownell*, 356 U.S. 44. And he could have brought a suit for a declaratory judgment of citizenship after he came to this country in 1960.

But petitioner did none of these things. Instead, he chose to enter this country furtively on the basis of a representation that he was a citizen, knowing that his citizenship status previously had been disputed. We can perceive in his situation no basis for relieving him from the statutory requirement for an immigrant visa, which is applicable to all aliens seeking to enter the United States.

Finally, petitioner argues that in any event no deportation order can be entered against him because he once was a citizen of the United States. One phase of this contention urges the district court's view, over-

[52] Such a certificate would have been acceptable as a travel document in lieu of a visa. See Section 360(b) and (c), Immigration and Nationality Act, 8 U.S.C. 1503(b) and (c).

ruled by the court of appeals, that petitioner was not amenable to exclusion or deportation until a court had determined that he had lost his American citizenship. We have already demonstrated the fallacy of this contention by showing that the loss of citizenship occurred automatically when the act of expatriation was committed (see pp. 61 *supra, et seq.*).

The second aspect of the argument is more sweeping and asserts that there is no power to deport a stateless, American-born expatriate. No authority is cited to buttress this hypothesis, and none can be. Its only support is said to be a dictum in the dissenting opinion of the Chief Justice in *Perez* v. *Brownell*, 356 U.S. at 65, note 6. The Chief Justice did not, of course, purport to decide this question but merely posed some doubts. His observations, as we read them, appear to be primarily directed to the expulsion of expatriates for misconduct in the United States and not to their deportation for illegal entry after they had lost their citizenship. This reading emerges more clearly upon reading the entire footnote, rather than the portion excerpted by petitioner.

We urge that petitioner cannot defeat deportation merely because he once was a citizen of the United States. It is clear enough, we believe, that the statutory directives for the exclusion and deportation of "any alien" encompass one in petitioner's situation. As we have noted, Section 101(a)(3), 8 U.S.C. 1101(a)(3) defines an alien as "any person not a citizen or national of the United States". And if cumulative evidence were needed that this explicit language includes expatriates, it can be found in the provisions, in the

current and prior statutes, giving special benefits under the immigration laws to certain categories of former citizens. *E.g.*, Section 101(a)(27) (D) and (E), Immigration and Nationality Act, 8 U.S.C. 1101(a)(27) (D) and (E).

Since the statutory design is plain, the only question raised in this connection concerns the power of Congress. An assault on the power of Congress to expel aliens who have entered illegally comes quite late in the day. And the notion that deportation constitutes punishment, in the constitutional sense, has been refuted by an unbroken line of decisions in this Court from *Fong Yue Ting v. United States,* 149 U.S. 698 to *Galvan* v. *Press,* 347 U.S. 522. See, also, *Flemming* v. *Nestor,* 363 U.S. 603, 616. We have shown that petitioner's expatriation resulted from a regulatory, rather than a punitive, measure. (See pp. 43, *supra, et seq.*). And since the mandate for the expulsion of aliens who entered illegally is general in application and manifestly regulatory in aim, we can see no reasonable basis for characterizing it as punitive in its application to petitioner, in the absence of any showing that Congress intended to inflict punishment.

In essence, petitioner's position is that a person who has lost his citizenship by actions in a foreign country has an absolute right to return to this country, without complying with the conditions prescribed by Congress for the entry of aliens. The acceptance of this argument would result in fragmentation of the power of Congress to fix the standards and conditions under which aliens may be admitted to the United States. See *Ekiu* v. *United States,* 142 U.S. 651; *The Chinese*

Exclusion Case, 130 U.S. 581. Since the deportation edict here merely effectuates the power to exclude, it is invulnerable to petitioner's challenge. See *Fong Yue Ting* v. *United States,* supra; *United States ex rel. Vajta* v. *Watkins,* 179 F. 2d 137, 139 (C.A. 2). We cannot believe that because petitioner was a former citizen he acquired immunity from deportation even though he entered the United States in violation of law.[53] Neither his former citizenship status nor his prior residence in this country exempted petitioner from compliance with the immigration laws when he sought to enter the United States. *Lem Moon Sing* v. *United States,* 158 U.S. 538, 547; *United States ex rel. Polymeris* v. *Trudell,* 284 U.S. 279; *Shaughnessy* v. *United States ex rel. Mezei,* 345 U.S. 206, 213. As an alien who breached those laws in entering the United States he is now deportable.[54]

[53] See *Rabang* v. *Boyd,* 353 U.S. 427, 433, in which this Court upheld a deportation order against a former national of the United States, stating: "The 1931 Act plainly covers the situation of the petitioner, who was an alien, and who was convicted of a federal narcotics offense".

[54] Citing a press statement by an unnamed "spokesman" (R. 24a), petitioner contends that the deportation order cannot be executed since no country would accept him. This contention is irrelevant to the determination of his deportability. Under the procedure in effect when his hearing was conducted, the place of deportation was not fixed during the deportation hearing, and its selection was postponed until deportability was finally determined. See *Foti* v. *INS,* 375 U.S. 217, 230, note 16. Therefore, there has as yet been no consideration of the place of deportation. When that occurs, petitioner will have an opportunity to designate his destination and to claim that he would be physically persecuted in one selected by the Government. Section 243 (a) and (h), Immigration and Nationality Act, 8 U.S.C. 1253 (a) and (h). And even if no other

CONCLUSION

Petitioner lost his United States citizenship by serving in the armed forces of Cuba. At the time he entered the United States in 1960 he did not comply with the statutory requirements for the entry of aliens, and his entry was unlawful. Consequently the order of deportation was valid and the judgment of the court of appeals directing dismissal of the writ of habeas corpus should be affirmed.

Respectfully submitted.

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country were willing to receive him, he would be subject to additional sanctions while he remained in this country. See *United States* v. *Witkovich*, 353 U.S. 194.